13

No. 01-679-CSX Title: Gonzaga University and Roberta S. League, Petitioners
v.
John Doe

Docketed:
November 8, 2001 Court: Supreme Court of Washington

Entry	Date	Proceedings and Orders
	Nov 8 2001	Petition for writ of certiorari filed. (Response due December 19, 2001)
	Nov 21 2001	Order extending time to file response to petition until December 17, 2001.
	Dec 14 2001	Order further extending time to file response to petition until December 19, 2001.
	Dec 19 2001	Brief of respondent John Doe in opposition filed.
	Dec 26 2001	DISTRIBUTED for Conference of January 11, 2002
	Dec 26 2001	Reply brief of petitioner Gonzaga Univ., et al. filed.
	Jan 11 2002	Petition GRANTED. limited to Question 1 presented by the petition. Petitioners' brief is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, February 25, 2002. Respondent's brief is to be filed with theClerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 27, 2002. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 15, 2002. Rule 29.2 is suspended in this case. SET FOR ARGUMENT April 24, 2002. **********
	Feb 22 2002	Brief amicus curiae of United States filed.
	Feb 22 2002	Brief amici curiae of Reporters Committee for Freedom of the Press, et al. filed.
	Feb 25 2002	Joint appendix filed.
	Feb 25 2002	Brief of petitioners Gonzaga University and Roberta S. League filed.
	Feb 25 2002	Brief amici curiae of Illinois, et al. filed.
	Feb 25 2002	Brief amici curiae of American Association of Community colleges, et al. filed.
	Feb 25 2002	LODGING consisting of twenty copies of material submitted by the Solicitor General.
	Mar 8 2002	CIRCULATED.
	Mar 11 2002	Record filed.
	Mar 27 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 27 2002	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Mar 27 2002	Brief of respondent John Doe filed.
	Apr 1 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 8 2002	Reply brief of petitioners Gonzaga University and Roberta S. League filed.
	Apr 24 2002	ARGUED.

Supreme Court, U.S.
FILED
01679 NOV 8 2001
OFFICE OF THE CLERK

No. 01-___

IN THE
Supreme Court of the United States

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
Petitioners,

v.

JOHN DOE,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a student sue a private university for damages under 42 U.S.C. § 1983 to enforce provisions of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, which disqualify from federal funding educational institutions that have a policy or practice of permitting education records to be released to unauthorized persons?

2. Does a private university act "under color of state law" when it does no more than provide information to a state official to meet a state requirement that it submit an affidavit attesting to a student's moral character?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Gonzaga University and Roberta S. League were defendants in the trial court, appellants and cross-appeal respondents in the Court of Appeals, and respondents in the Washington Supreme Court. Respondent John Doe was the plaintiff in the trial court, respondent and cross-appellant in the Court of Appeals, and petitioner in the Washington Supreme Court. Susan Kyle and Julia Lynch were defendants in the trial court, appellants and cross-appeal respondents in the Court of Appeals, and respondents in the Washington Supreme Court. Petitioner Gonzaga University is a Washington non-profit corporation with no stock issued.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. THE COURT BELOW FAILED TO APPLY THE STANDARD ANNOUNCED IN *SUTER*, AND CONFIRMED IN *BLESSING*, THAT A PLAINTIFF HAS A "RIGHT, PRIVILEGE OR IMMUNITY" ENFORCEABLE UNDER SECTION 1983 ONLY IF CONGRESS UNAMBIGUOUSLY INTENDED TO CONFER AN INDIVIDUAL RIGHT TO ENFORCE A REQUIREMENT OF FEDERAL LAW.	8
II. THE DECISION BELOW EXACERBATES A CONFLICT AMONG FEDERAL COURTS.	14

TABLE OF CONTENTS—Continued

		Page
CONCLUSION		20
APPENDICES		
Appendix A:	Opinion of the Supreme Court of the State of Washington (May 31, 2001)	1a
Appendix B:	Order of the Supreme Court of the State of Washington denying reconsideration (August 10, 2001)	29a
Appendix C:	Opinion of the Court of Appeals of the State of Washington, Division One (January 31, 2000)	30a

TABLE OF AUTHORITIES

	Page
CASES:	
Achman v. *Chisago Lakes Indep. Sch. Dist. No. 2144*, 45 F. Supp. 2d 664 (D. Minn. 1999)	15
Ackerley Communications of Fla., Inc. v. *Henderson*, 881 F.2d 990 (11th Cir. 1989)	17
Arkansas Med. Soc'y, Inc. v. *Reynolds*, 6 F.3d 519 (8th Cir. 1993)	9, 16
Belanger v. *Nashua, N.H., Sch. Dist.*, 856 F. Supp. 40 (D.N.H. 1994)	10, 16
Blessing v. *Freestone*, 520 U.S. 329 (1997)	*passim*
Brown v. *City of Oneonta*, 106 F.3d 1125 (2d Cir. 1997)	15
Burton v. *Wilmington Parking Auth.*, 365 U.S. 715 (1961)	19
Doe v. *Knox County Bd. of Educ.*, 918 F. Supp. 181 (E.D. Ky. 1996)	10
Duke v. *Absentee Shawnee Tribe Housing Auth.*, 199 F.3d 1123 (10th Cir. 1999), *cert. denied*, 529 U.S. 1134 (2000)	17
Falvo v. *Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203 (10th Cir. 2000), *cert. granted*, 121 S. Ct. 2547 (2001)	15, 16, 17
Fay v. *South Colonie Cent. Sch. Dist.*, 802 F.2d 21 (2d Cir. 1986)	10
Francois v. *University of D.C.*, 788 F. Supp. 31 (D.D.C. 1992), *aff'd*, 1993 WL 32350 (D.C. Cir. 1993)	10
Gilliam v. *National Comm'n for Certification of Physician Assistants, Inc.*, 727 F. Supp. 1512 (E.D. Pa. 1989), *aff'd*, 898 F.2d 140 (3d Cir.), *cert. denied*, 495 U.S. 920 (1990)	18

TABLE OF AUTHORITIES—Continued

Page

CASES:

Girardier v. *Webster College*, 563 F.2d 1267 (8th Cir. 1977) 10

Goodreau v. *Rector & Visitors of Univ. of Va.*, 116 F. Supp. 2d 694 (W.D. Va. 2000) 15

Gundlach v. *Reinstein*, 114 F.3d 1172 (3d Cir. 1997) 14

Gundlach v. *Reinstein*, 924 F. Supp. 684 (E.D. Pa. 1996) 14

Hartfield v. *East Grand Rapids Pub. Schs.*, 960 F. Supp. 1259 (W.D. Mich. 1997) 10

Harris v. *James*, 127 F.3d 993 (11th Cir. 1989) 16

Johnson v. *Educational Testing Serv.*, 754 F.2d 20 (1st Cir.), *cert. denied*, 472 U.S. 1029 (1985) 18

Joseph M. ex rel. Kimberly F. v. *Southeast Delco Sch. Dist.*, 2001 WL 283154 (E.D. Pa. Mar. 19, 2001) 14

Klein Indep. Sch. Dist. v. *Mattox*, 830 F.2d 576 (5th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988) 10

Kuehn v. *Renton Sch. Dist. No. 403*, 694 P.2d 1078 (Wash. 1985) 18

Langston v. *ACT*, 890 F.2d 380 (11th Cir. 1989) 18

Maynard v. *Greater Hoyt Sch. Dist. No. 61-4*, 876 F. Supp. 1104 (D.S.D. 1995) 15

Meury v. *Eagle-Union Cmty. Sch. Corp.*, 714 N.E.2d 233 (Ind. Ct. App. 1999) 14

NCAA v. *Tarkanian*, 488 U.S. 179 (1988) 18

TABLE OF AUTHORITIES—Continued

Page

CASES:

Norris by Norris v. *Board of Educ. of Greenwood Cmty. Sch. Corp.*, 797 F. Supp. 1452 (S.D. Ind. 1992) 10, 12, 14, 15

Norwood v. *Sammons*, 788 F. Supp. 1020 (W.D. Ark. 1991) 10

Odom v. *Columbia Univ.*, 906 F. Supp. 188 (S.D.N.Y. 1995) 10

Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981) 9

Rothman v. *Emory Univ.*, 828 F. Supp. 537 (N.D. Ill. 1993) 10

Sammons v. *Nat'l Comm'n on Certification of Physician Assistants, Inc.*, 104 F. Supp. 2d 1379 (N.D. Ga. 2000) 18

Schmalenberg v. *Tacoma News, Inc.*, 943 P.2d 350 (Wash. Ct. App. 1997), *review denied*, 958 P.2d 314 (Wash. 1998) 13

Sigmon v. *CommunityCare HMO, Inc.*, 234 F.3d 1121 (10th Cir. 2000) 18

Smith v. *Duquesne Univ.*, 612 F. Supp. 72 (W.D. Pa. 1985), *aff'd without op.*, 787 F.2d 583 (3d Cir. 1986) 10, 12, 14

Stowell v. *Ives*, 976 F.2d 65 (1st Cir. 1992) 9, 15, 16

Suter v. *Artist M.*, 503 U.S. 347 (1992) ..... *passim*

Tarka v. *Cunningham*, 917 F.2d 890 (5th Cir. 1990) 10, 15

Tarka v. *Franklin*, 891 F.2d 102 (5th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990) 10

Wilder v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) 10, 16

TABLE OF AUTHORITIES—Continued

Page

STATUTES AND REGULATIONS:

Family Educational Rights and Privacy Act,
20 U.S.C. § 1232g ..... *passim*
20 U.S.C. § 1232g(b) 2, 6, 10
20 U.S.C. § 1232g(b)(1) 10
20 U.S.C. § 1232g(f) 12
20 U.S.C. § 1232g(g) 12, 13
28 U.S.C. § 1257(a) 2
42 U.S.C. § 1983 ..... *passim*
34 C.F.R. § 99.21 13
34 C.F.R. § 99.22 13
34 C.F.R. § 99.60 13
34 C.F.R. § 99.63 13
34 C.F.R. § 99.64 13
34 C.F.R. § 99.65 13
34 C.F.R. § 99.66 13
34 C.F.R. § 99.67 13
Rev. Code Wash. §§ 28A.410.010 - .240 18
Wash. Admin. Code 180-75-017 (1997) 19
Wash. Admin. Code 180-75-082(3) (1997) 5
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TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

Dixie Snow Huefner & Lynn M. Daggett, *Commentary: FERPA Update: Balancing Access to and Privacy of Student Records*, 152 Ed. Law Rep. 469 (2001) 19

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1 William W. Story, *A Treatise on the Law of Contracts* (4th ed. 1856) 13

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PETITION FOR A WRIT OF CERTIORARI

Gonzaga University and Roberta S. League ("Gonzaga") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is reported at 24 P.3d 390, and reproduced in the appendix hereto ("App.") at 1a. The order of the Supreme Court of the State of Washington denying reconsideration is unreported, and reproduced at App. 29a. The opinion of the Court of Appeals of the State of Washington is reported at 992 P.2d 545, and reproduced at App. 30a.

JURISDICTION

The judgment of the Washington Supreme Court was entered on May 31, 2001. App. 1a. On August 10, 2001, the Washington Supreme Court denied Gonzaga's timely motion for reconsideration. App. 29a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

This case presents an issue under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g. That statute provides, in pertinent part:

* * *

> (1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein * * *) of students without the written consent of their parents to any individual, agency, or organization, other than [as set forth below].
>
> * * *
>
> (2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records [except as provided below].

20 U.S.C. § 1232g(b).

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person

> within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.

INTRODUCTION

Before the decision below, no reported case had held that a private education institution could be sued for damages under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. This case presents the question whether a private litigant can use 42 U.S.C. § 1983 to impose liability on a private institution that attempts to report to state teacher-licensing authorities allegations that a future teacher violently and repeatedly sexually assaulted a fellow student. The Washington Supreme Court reinstated a $450,000 compensatory and punitive damage verdict for the alleged assailant, even though FERPA provides no express private right of action and nowhere evinces the unambiguous Congressional intent required to use § 1983 against a private university in these circumstances.

This Court's review is plainly warranted. The decision below cannot be reconciled with the approach required by this Court's precedents to determine whether a federal statute creates individual rights privately enforceable under § 1983, and there is a direct conflict between the Washington Supreme Court and other federal and state courts that have addressed the issue.

STATEMENT OF THE CASE

Background

This § 1983 case arises out of a teacher-in-training's claim that Gonzaga (a private Jesuit university located in Washington state) violated his rights under FERPA because members of its faculty discussed with a state investigator another student's accusation that he sexually assaulted her.

As the Washington Supreme Court acknowledged, in 1993 petitioner Roberta League, the certification specialist at Gonzaga's school of education, and Dr. Susan Kyle, director of field experience for student teachers at Gonzaga, heard reports from student Julia Lynch that respondent John Doe[1] – a school of education student – sexually assaulted student Jane Doe. App. 2a-3a. According to League and Kyle, Lynch reported that Jane Doe told her that John Doe sexually assaulted Jane Doe three times and coerced her into "aberrant sexual behavior." App. 4a. When Kyle approached her, Jane Doe refused to make a formal statement about the allegations and would not comment on her relationship with John Doe, stating, according to Kyle, "I guess I don't really know what date rape is," and "I promised [John Doe] I wouldn't tell. He made me promise." App. 5a.

As the Washington Supreme Court further acknowledged, other Gonzaga faculty members testified that Jane Doe told them about John Doe's behavior. App. 5a. The department chair, Janet Burcalow, testified that Jane Doe admitted being afraid of what might happen if John Doe discovered that she talked about their relationship, and urged Burcalow not to pursue the matter. App. 6a.

Other evidence, also acknowledged by the Washington Supreme Court, corroborated that testimony. John Doe admitted having intercourse with Jane Doe but claimed it was consensual. App. 7a. Yet he admitted that Jane Doe told him that a medical professional concluded that "the intercourse appeared forced." App. 4a.

Washington State Board of Education regulations, in effect at the time, governed the teacher certification process. They required a designated official of an applicant's school to

[1] Although respondent's identity was made public during proceedings below, we follow the Washington Supreme Court in referring to him as John Doe and to the student he allegedly assaulted as Jane Doe. *See* App. 2a.

consult faculty members who knew the applicant, and to swear that the school official and consulted faculty members had "no knowledge that the applicant has been convicted of any crime and no knowledge that the applicant has a history of any serious behavioral problems." Wash. Admin. Code 180-75-082(3) (1997) (repealed effective Mar. 8, 1997).[2]

Concerned that these events might affect the dean's ability to submit an affidavit supporting John Doe's application for teacher certification, League discussed the matter with Adelle Nore, a senior investigator with the Office of the Superintendent of Public Instruction (OSPI), the state agency that regulates teacher education programs in Washington. Other Gonzaga personnel also contacted Nore concerning the allegations against John Doe. During one contact, League gave Nore John Doe's name.

Respondent's state law defamation claims were based on Gonzaga's internal documentation of these sexual misconduct allegations, and on the facts reported to OSPI. His FERPA claim is premised entirely on disclosure to OSPI of his name and the reported allegations.

Pursuant to the pertinent board of education regulation, the Gonzaga school of education dean, Dr. Corinne McGuigan, eventually concluded that sufficient evidence of a serious behavior problem precluded her from signing the affidavit supporting John Doe's application for teacher certification. Gonzaga never provided OSPI an affidavit regarding John Doe.

[2] The provision that replaced section 180-75-082 of the Washington Administrative Code similarly requires a teacher certification applicant's school of education to submit an affidavit attesting to "the applicant's character or fitness." Wash. Admin. Code 180-79A-155(3).

Proceedings Below

John Doe sued Jane Doe for defamation and Gonzaga for defamation, negligence, and breach of educational contract. John Doe later added the individual defendants as well as a § 1983 claim, against Gonzaga and the individual defendants, that alleged violation of FERPA for releasing his name to OSPI.

At trial, Gonzaga moved for judgment as a matter of law on the FERPA claim. Gonzaga argued that FERPA creates no right or privilege that private parties may enforce under § 1983 and that Gonzaga's challenged conduct was not in any event under color of law. The trial court denied the motion.

A jury returned a verdict for John Doe on all five theories of recovery and awarded him a total of $1,155,000 in damages. App. 9a. In connection with the FERPA claim, the jury awarded $150,000 in compensatory and $300,000 in punitive damages. *Id.* The trial court entered judgment on the verdict and awarded John Doe attorneys' fees and costs. *Id.*

Gonzaga appealed the denial of its motions and the judgment. On appeal Gonzaga argued, among other things, that FERPA may not be enforced by private actions under § 1983 and that its challenged conduct was not under color of law.

The Washington Court of Appeals reversed the judgment on all five of John Doe's claims, including the FERPA claim. App. 53a. The Court of Appeals held that "FERPA does not create individual rights privately enforceable under 42 U.S.C. § 1983." App. 47a. FERPA, the court noted, provides that federal funds be unavailable to an education institution that "has a policy or practice of permitting the release of education records" without consent. *Id.* (quoting 20 U.S.C. § 1232g(b)). "Like the federal law at issue in [*Blessing* v. *Freestone*, 520 U.S. 329 (1997)]," the court concluded, FERPA requires that schools "have in place a system-wide

plan; the law is not intended to ensure that 'the needs of any particular person have been satisfied.' " *Id.* (quoting *Blessing*, 520 U.S. at 343). The Washington Supreme Court granted John Doe's petition for review.

The Washington Supreme Court Decision

On petition for review, the Washington Supreme Court addressed the question "[w]hether FERPA creates any right or privilege which can be enforced by individuals under 42 U.S.C. sec. 1983." App. 11a. Although the court acknowledged that "FERPA itself does not give rise to a private cause of action," App. 19a, it nonetheless concluded that "the FERPA provision at issue here gives rise to a federal right enforceable under section 1983." App. 20a.

The Washington Supreme Court purported to analyze the § 1983 enforceability question under the "three-factor test" this Court applied in *Blessing*. *Id.* Specifically, the court asked "(1) whether Congress intended the provision in question to benefit the plaintiff; (2) whether the right protected by the statute is so 'vague and amorphous' that its enforcement would strain judicial competence; and (3) whether the statute imposes a binding obligation on the states." App. 19a-20a. Reviewing each factor, the court found that FERPA "is intended to benefit students"; that "the right is not so 'vague and amorphous' that the court cannot enforce it"; and that "the FERPA provision provides a binding obligation." App. 20a. Based on that analysis, the court concluded that John Doe was entitled to bring a FERPA claim against Gonzaga under § 1983.

In so holding, the court failed to follow this Court's directly pertinent precedents. In *Suter* v. *Artist M.*, 503 U.S. 347 (1992), this Court made clear that the overriding concern in determining whether a federal statute creates rights enforceable under § 1983 is whether the statutory language "unambiguously confer[s] an enforceable right upon the Act's beneficiaries * * * ." *Id.* at 363; *see id.* at 357 (same).

Yet the Washington Supreme Court failed to apply the analysis of *Suter*, and failed to find that FERPA *unambiguously* confers such a right. Indeed, the court's only citation to *Suter* came in a footnote that implicitly criticized the Washington Court of Appeals' reliance on that decision. App. 20a n.11.

The Washington Supreme Court also failed to acknowledge the substantial authority that directly conflicts with its decision. And the court cited no cases that have upheld a FERPA claim, under § 1983 or otherwise, against a private university, or any non-public education institution.

Finally, the court held that although Gonzaga is a private university, it was subject to § 1983 because "Gonzaga acts for the State when it completes the moral affidavit for a student." App. 22a. The court reversed the Court of Appeals and remanded with instructions to reinstate the judgment on all of John Doe's claims – including both compensatory and punitive damages on the FERPA claim – except the negligence claim, which, it held, should be dismissed. App. 28a.[3]

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW FAILED TO APPLY THE STANDARD ANNOUNCED IN *SUTER*, AND CONFIRMED IN *BLESSING*, THAT A PLAINTIFF HAS A "RIGHT, PRIVILEGE OR IMMUNITY" ENFORCEABLE UNDER SECTION 1983 ONLY IF CONGRESS UNAMBIGUOUSLY INTENDED TO CONFER AN INDIVIDUAL RIGHT TO ENFORCE A REQUIREMENT OF FEDERAL LAW.

1. Although the Washington Supreme Court properly recognized that FERPA itself confers no private cause of

[3] The Washington Supreme Court stayed the judgment on the FERPA claim pending this petition and any subsequent proceedings in this Court. Petitioners have satisfied the judgment with respect to the non-FERPA claims.

action, the court held that respondent could nonetheless bring this action under § 1983. Whether FERPA is enforceable by private § 1983 actions is a question of first impression in this Court. Based on the Court's recent pertinent decisions, however, it is clear that Congress did not indicate the requisite intent to authorize private suits under § 1983 to enforce FERPA.

In *Suter* v. *Artist M.*, the Court significantly narrowed the category of federal statutes enforceable under § 1983, announcing the required question: "Did Congress, in enacting the [statute], unambiguously confer upon the * * * beneficiaries of the [statute] a right to enforce the requirement" at issue? 503 U.S. at 357. Where, as in *Suter* and here, Congress imposes obligations on states pursuant to its spending power, " '[t]he legitimacy of Congress' power to legislate * * * rests on whether the State voluntarily and knowingly accepts the terms of the 'contract,' " and there can be "no knowing acceptance if a State * * * is unable to ascertain what is expected of it." *Id.* at 356 (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)) (citations and footnote omitted). Thus, under *Suter*, for a court to find in FERPA a private enforcement right under § 1983, Congress's intent to confer such a right must be "unambiguous[ ]". *Id.* at 357. *See Arkansas Med. Soc'y, Inc.* v. *Reynolds*, 6 F.3d 519, 525 (8th Cir. 1993); *Stowell* v. *Ives*, 976 F.2d 65, 70 (1st Cir. 1992).

After *Suter*, it is no longer sufficient to show that the plaintiff benefits generally from a requirement that a federal funds recipient must adhere to a federal statutory policy. Although the statute in *Suter* required state recipients of federal funds to adopt plans regarding removal of children from and return to their homes, and although those requirements unquestionably benefited children, the federal law, the Court held, did not give any child an enforceable right under § 1983. 503 U.S. at 352, 358, 363.

In *Blessing* the Court confirmed that rule in holding that a statute conditioning receipt of federal funds on compliance with federal child support principles did not confer a § 1983 right. 520 U.S. at 343. Section 1983 rights might have been conferred, the Court noted, had the statute required mandatory payments to children that the state had failed to make. *Id.* at 345-346. The Court emphasized the difference between a statute that "creat[es] an *individual* entitlement" and one that regulates "*systemwide* performance." *Id.* at 343 (emphasis in original). The Court also emphasized that the statute provided no enforcement mechanism to "command the State to take any particular action," but instead provided only for reduction of federal funding in the event of "substantial noncompliance." *Id.* at 344.

FERPA's text reveals utterly no Congressional intent – and certainly not the "unambiguous[ ]" intent *Suter* requires – to permit private enforcement of the provision at issue here. [4] Nothing in the statute placed states or, for that matter, private universities, on notice that individual alleged instances of unconsented disclosure of education records would subject them to private damages actions by students and parents. To

[4] Courts uniformly have held that FERPA itself provides no private right of action. *See Fay* v. *South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986); *Tarka* v. *Cunningham*, 917 F.2d 890, 891 (5th Cir. 1990); *Klein Indep. Sch. Dist.* v. *Mattox*, 830 F.2d 576, 579 (5th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988); *Girardier* v. *Webster College*, 563 F.2d 1267, 1276-77 (8th Cir. 1977); *Tarka* v. *Franklin*, 891 F.2d 102, 104 (5th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); *Hartfield* v. *East Grand Rapids Pub. Schs.*, 960 F. Supp. 1259, 1264 (W.D. Mich. 1997); *Doe* v. *Knox County Bd. of Educ.*, 918 F. Supp. 181, 184 (E.D. Ky. 1996); *Odom* v. *Columbia Univ.*, 906 F. Supp. 188, 195 (S.D.N.Y. 1995); *Belanger* v. *Nashua, N.H., Sch. Dist.*, 856 F. Supp. 40, 43 n.4 (D.N.H. 1994); *Rothman* v. *Emory Univ.*, 828 F. Supp. 537, 542 (N.D. Ill. 1993); *Norris by Norris* v. *Board of Educ. of Greenwood Cmty. Sch. Corp.*, 797 F. Supp. 1452, 1462 (S.D. Ind. 1992); *Norwood* v. *Sammons*, 788 F. Supp. 1020, 1026 (W.D. Ark. 1991); *Smith* v. *Duquesne Univ.*, 612 F. Supp. 72, 80 (W.D. Pa. 1985), *aff'd without op.*, 787 F.2d 583 (3d Cir. 1986).

the contrary, the pertinent section of FERPA simply provides, subject to various conditions and exceptions, that "[n]o funds shall be made available * * * to any educational agency or institution which has a policy or practice of permitting the release of education records * * *." 20 U.S.C. § 1232g(b)(1). FERPA thus merely conditions the availability of federal funds on an institution not having such a policy or practice. *Francois* v. *University of D.C.*, 788 F. Supp. 31, 33 (D.D.C. 1992), *aff'd*, 1993 WL 32350 (D.C. Cir. 1993). FERPA creates no individual enforcement right for particular instances of disclosure.

Further, as in *Blessing*, FERPA contains no mechanism for sanction of individual disclosures of student information. The Secretary of Education cannot "command the State to take any particular action," but is authorized only to terminate federal funding. That no Secretary has ever exercised that extraordinary authority confirms that the Department of Education consistently has interpreted FERPA to authorize sanctions only when noncompliance is systemic, chronic, and extreme. *See* John Lowery, *LeRoy Rooker on FERPA as a defender of education and privacy rights on today's college campuses*, 10 Synthesis: Law and Policy in Higher Education 716, 731 (1998).

The Washington Supreme Court erred in failing to apply the requirement, announced in *Suter* and confirmed in *Blessing*, that Congress must "unambiguously" have intended to confer private rights under the statutory provision at issue. Having failed that test, a statute cannot confer § 1983 rights even if, as the Washington Supreme Court stated, the statute nominally conformed to the three-part test announced in *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498, 509 (1990) ((1) whether the provision in question was intended to benefit the plaintiff; (2) whether the right protected by the statute is so "vague and amorphous" that its enforcement would strain judicial competence; and (3) "whether the statute imposes a binding obligation on the State").

Indeed, application of the *Wilder* test, in light of *Suter* and *Blessing*, clearly reveals that the requisite expression of Congressional intent is absent from FERPA. First, the pertinent FERPA provisions require only that participating institutions have a system-wide plan in place that does not permit unconsented release of education records or personally identifiable information. 20 U.S.C. § 1232g(b). FERPA does not by its terms protect individual students against particular disclosures. "FERPA was adopted to address systematic, not individual, violations of students' privacy and confidentiality rights * * *." *Smith*, 612 F. Supp. at 80. Because Congress addressed institution-wide policies and practices, not particular disclosures, it is evident that Congress did not intend to ensure that "the needs of any particular person have been satisfied." *Blessing*, 520 U.S. at 343. Nor does the statute "bind[ ]" the state or private recipients by putting them on notice that *they*, rather than the U.S. Department of Education, are responsible for providing remedies to students for particular instances of disclosure of education records by individual university personnel. *See Suter*, 503 U.S. at 357. Finally, if FERPA creates enforceable individual rights, those rights are undoubtedly "vague and amorphous," because the statute does not specify what obligations education institutions and agencies have to prevent *individual* violations; it conditions federal funding only on recipients' not having certain *policies or practices*.

With respect to individual students, Congress did express an unambiguous intention when it enacted FERPA. That intention, rather than conferring rights on individuals to go to court, made available an extensive administrative mechanism, through the U.S. Department of Education, for redress *by government* of students' claims.[5] *See Norris*, 797 F. Supp.

[5] *See* 20 U.S.C. § 1232g(f) (authorizing the Secretary of Education to "deal with violations of this section"); *id.* § 1232g(g) (requiring the Secretary to "establish or designate an office and review board" for "investigating, processing, reviewing and adjudicating violations of [FERPA] and complaints which may be filed concerning alleged violations of [FERPA]"); 34 C.F.R. § 99.60 (establishing the Family Policy Compliance Office ("FPCO") and designating the Office of Administrative Law Judges to act as review board); *id.* §§ 99.21, 99.22 (establishing a process for institutional review board adjudication of individual FERPA grievances); 20 U.S.C. § 1232g(g) (permitting parents and eligible students to file written complaints with FPCO regarding alleged FERPA violations); 34 C.F.R. § 99.63 (same); *id.* §§ 99.64 – 99.67 (setting forth detailed procedures for FPCO review of student complaints and for enforcement of FPCO determinations).

at 1465. Respondent never attempted to avail himself of that process.[6]

The same concerns that made the *Suter* Court highly reluctant to construe Spending Clause legislation as conferring privately enforceable individual rights apply with at least equal force to the Spending Clause statute at issue here. Legislation enacted under the Spending Clause is in the nature of a contract: states agree to comply with federally imposed conditions in exchange for federal funds. *Pennhurst State Sch. & Hosp.*, 451 U.S. at 17. Plaintiffs in cases like this one are not parties to the contract. *Blessing*, 520 U.S. at 349 (Scalia, J., concurring). They are at most third-party beneficiaries. As such, they were not entitled, under the law at the time § 1983 was enacted, to sue upon the contract. *Id.* at 350 (citing 1 William W. Story, *A Treatise on the Law of Contracts* 549-550 (4th ed. 1856)). Here, accordingly, respondent has no right of action under § 1983 because his ability to compel Gonzaga to make good on its promise to the

[6] Respondent never filed a complaint with the Secretary or FPCO concerning the circumstances in this case. Instead, he simply included counts alleging a FERPA violation among the multiple state law claims in his state court lawsuit. Adding the FERPA claim, which was based on substantially the same alleged conduct as his defamation claim, enabled respondent to receive punitive damages, which were not available under his state law defamation and contract claims. *See Schmalenberg* v. *Tacoma News, Inc.*, 943 P.2d 350, 363 (Wash. Ct. App. 1997), *review denied*, 958 P.2d 314 (Wash. 1998).

Federal Government was not a "righ[t] * * * secured by the * * * laws" under § 1983. *Id.*

II. THE DECISION BELOW EXACERBATES A CONFLICT AMONG FEDERAL COURTS.

1. The decision below also conflicts with the holdings of federal and other state courts on the question presented. In *Gundlach* v. *Reinstein*, 114 F.3d 1172 (3d Cir. 1997), the Third Circuit summarily affirmed a district court decision that barred "redress pursuant to a FERPA-based § 1983 claim." *Gundlach*, 924 F. Supp. 684, 692 (E.D. Pa. 1996). The district court, noting "*Suter*'s mandate that the statute at issue be read strictly with an eye toward gleaning its precise requirements," found "no unambiguous intention on the part of the Congress to permit the invocation of § 1983 to redress an individual release of records allegedly covered by FERPA." *Id.* at 691, 692. The Third Circuit has consistently affirmed district court rulings that "FERPA was adopted to address systematic, not individual, violations of students' privacy and confidentiality rights * * * ." *Smith* v. *Duquesne Univ.*, 612 F. Supp. at 80.

Other courts, too, that have properly applied this Court's precedents have held that an alleged violation of FERPA does not give rise to a private § 1983 action. *Meury* v. *Eagle-Union Cmty. Sch. Corp.*, 714 N.E.2d 233, 239 (Ind. Ct. App. 1999) ("The enforcement provisions within FERPA explicitly provide that the Secretary of Education is solely responsible for enforcement, thereby preempting a private cause of action [under § 1983]."); *Norris*, 797 F. Supp. at 1465 ("The statutory basis [FERPA] alleged for Plaintiff's claim is insufficient/ to support a § 1983 action for damages."); *Joseph M. ex. rel. Kimberly F.* v. *Southeast Delco Sch. Dist.*, 2001 WL 283154, at *10 (E.D. Pa. Mar. 19, 2001) (denying request for relief under § 1983 to enforce FERPA, citing *Suter* and *Gundlach*).

As these cases illustrate, since *Suter* it has been clear that "when a provision in a statute fails to impose a direct obligation on the States, instead placing the onus of compliance with the statute's substantive provisions on the federal government, no cause of action cognizable under section 1983 can flourish." *Stowell* v. *Ives*, 976 F.2d at 70. The FERPA provisions at issue here fall squarely in that category. By FERPA's express terms, Congress set forth a comprehensive mechanism according to which the U.S. Secretary of Education has sole authority to investigate and remedy student and parent allegations of FERPA violations. As the post-*Suter* courts recognize, "FERPA provides expressly that the Secretary of Education is responsible for enforcing the provisions and protections of FERPA; Section 1983 does not create a private right of action for damages where the federal statute provides an exclusive administrative enforcement mechanism." *Norris*, 797 F. Supp. at 1465.

The only federal court of appeals decisions to the contrary either pre-dated *Suter*, and thus applied the more lenient test of the Court's earlier cases, *see Tarka* v. *Cunningham*, 917 F.2d 890, or post-dated *Suter* but simply failed to apply the standard *Suter* requires. *See Falvo* v. *Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203, 1211 n.6 (10th Cir. 2000) (holding that "any analytical additions announced in *Suter* are no longer to be followed") (citation and internal punctuation omitted), *cert. granted*, 121 S. Ct. 2547 (2001); *Brown* v. *City of Oneonta*, 106 F.3d 1125 (2d Cir. 1997) (failing to apply the controlling analysis of *Suter*); *see also Maynard* v. *Greater Hoyt Sch. Dist. No. 61-4*, 876 F. Supp. 1104, 1107 (D.S.D. 1995) (noting that no federal appellate court to date had addressed the issue under the "post-*Suter* framework"); *Achman* v. *Chisago Lakes Indep. Sch. Dist. No. 2144*, 45 F. Supp. 2d 664, 673 n.10 (D. Minn. 1999) (refusing to apply *Suter* analysis). Given the inconsistent application of this Court's precedents, it should come as no surprise that "there is a split of authority over whether FERPA can form the basis

of a claim under section 1983." *Goodreau* v. *Rector & Visitors of Univ. of Va.*, 116 F. Supp. 2d 694, 707 (W.D. Va. 2000).

2. The cases analyzing the enforceability of FERPA under § 1983 also underscore the confusion among lower courts on the broader question of the proper test to determine whether a federal statute may be enforced in a § 1983 action. At least one court concluded that in *Suter* "the Court appeared to abandon the framework established in * * * *Wilder*." *Belanger* v. *Nashua, N.H., Sch. Dist.*, 856 F. Supp. at 43. Another held that *Suter* added "additional considerations" to the *Wilder* approach. *Arkansas Med. Soc'y*, 6 F.3d at 525. Others held it "possible to synthesize the teachings of *Suter* with the Court's prior precedents." *Stowell*, 976 F.2d at 68. *See Harris* v. *James*, 127 F.3d 993, 1002 (11th Cir. 1989) (noting federal courts of appeals' "divergent views" on the effect of *Suter* on *Wilder*). And one held that "analytical additions announced in *Suter* are no longer to be followed." *Falvo*, 233 F.3d at 1211 n.6 (citation and internal punctuation omitted). This Court's review in this case would permit it to resolve this widespread confusion over the proper standard to apply in deciding such § 1983 claims.

3. The Court's decision in *Owasso Independent School District No. I-011* v. *Falvo*, No. 00-1073 (cert. granted June 25, 2001), is likely to have an impact on the issue presented in this case. Because the Court's opinion in *Falvo* – its first opportunity to consider FERPA – may well shed important light on the question whether FERPA may be enforced in a private damages action under § 1983, the Court should at least hold this case pending decision in *Falvo*.

In *Falvo*, the Tenth Circuit held that parents of students could sue the defendant school district under § 1983 for an alleged violation of FERPA. Although the parties did not raise on appeal whether private § 1983 actions may enforce FERPA, the Tenth Circuit addressed the issue because

"[w]hether the alleged violation of FERPA is actionable under 42 U.S.C. § 1983 * * * may implicate this court's and the district court's jurisdiction * * *." 233 F.3d at 1210 (citing *Duke* v. *Absentee Shawnee Tribe Housing Auth.*, 199 F.3d 1123, 1125 (10th Cir. 1999), *cert. denied*, 529 U.S. 1134 (2000); *Ackerley Communications of Fla., Inc.* v. *Henderson*, 881 F.2d 990, 993 (11th Cir. 1989)).

This Court granted certiorari to decide whether FERPA prohibits teachers from requiring students to grade each others' papers in class. In reviewing FERPA for the first time since its enactment, the Court, even if it does not address directly whether FERPA may be enforced by private § 1983 actions, may well decide issues pertinent to that question. For example, the Court in *Falvo* may well need to consider whether disclosures not pursuant to an institutional policy or practice violate FERPA, whether Congress intended FERPA to benefit the plaintiffs, and whether the FERPA rights allegedly violated were vague and ambiguous – questions directly pertinent to the Washington Supreme Court's ruling in this case. *See* App. 20a.

The Court thus should at a minimum hold this case and, if the Court's opinion in *Falvo* might affect the decision below in this case, grant certiorari in this case, vacate the judgment, and remand for reconsideration.

4. The decision below also conflicts with well-established authority holding that private actors' conduct is not subject to § 1983 merely because those actors make recommendations to the state. The Washington Supreme Court stood that principle on its head when it held that Gonzaga acted "under color of state law" because university personnel complied with a state law requirement that a university official submit moral character affidavits to OSPI. App. 22a. The only authority the court cited for that holding was a case in which it held that to be a state actor "[i]t is enough that [a private person] is a willful participant in joint action with the state or

its agents." *Id.* (quoting *Kuehn* v. *Renton Sch. Dist. No. 403*, 694 P.2d 1078 (Wash. 1985)). The court's ruling conflicts with the weight of authority, which holds that private actors are not transformed into state actors whenever the state relies on their recommendations or certifications.

A private party is not transformed into a state actor under the "joint action" theory merely by supplying information that pertains to a governmental decision. *See NCAA* v. *Tarkanian*, 488 U.S. 179, 195-96 (1988). Rather, the "joint action" is "under color of state law" if the state has essentially delegated to the private actor the power to make the decision for the state. *Id.* at 197 ("[T]he NCAA did not – indeed, could not – directly discipline Tarkanian or any other state university employee."); *Sigmon* v. *CommunityCare HMO, Inc.*, 234 F.3d 1121, 1127 (10th Cir. 2000) (state contractor that recommended placement of state employee in drug treatment program did not act under color of state law); *Johnson* v. *Educational Testing Serv.*, 754 F.2d 20, 24 (1st Cir.) (private organization that tests and reports scores of teachers to state licensing authorities is not state actor: "ETS merely reports test scores and lacks authority to decide who shall be admitted and who shall be rejected"), *cert. denied*, 472 U.S. 1029 (1985); *Langston* v. *ACT*, 890 F.2d 380, 384-385 (11th Cir. 1989) (test-provider not a state actor although public universities rely on its tests to evaluate students); *Gilliam* v. *National Comm'n for Certification of Physician Assistants, Inc.*, 727 F. Supp. 1512, 1514 (E.D. Pa. 1989) (private organization not state actor even though "its certifications are relied upon by many states in their licensing decisions"), *aff'd*, 898 F.2d 140 (3d Cir.), *cert. denied*, 495 U.S. 920 (1990); *Sammons* v. *National Comm'n on Certification of Physician Assistants, Inc.*, 104 F. Supp. 2d 1379, 1382-83 (N.D. Ga. 2000) (same).

Here, Gonzaga had no authority to determine who would be certified to teach. Rev. Code Wash. § 28A.410.010 - .240 (state retains authority to impose detailed certification

requirements); Wash. Admin. Code § 180-75-017 (1997) (moral character affidavit from school not required). While a private actor's conduct may constitute state action where the state "has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity," *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961), the mere act of providing – or, as here, declining to provide – a recommendation to the state is not sufficient to convert a private party into an arm of the state. The Washington Supreme Court determination that Gonzaga was a state actor merely because its personnel submitted moral character affidavits to the state thus conflicts with this Court's precedents as well as decisions of the First, Tenth, and Eleventh Circuits and other federal courts.

5. This case presents a federal question of profound importance to thousands of education institutions throughout the nation. If FERPA is interpreted to permit private suits under § 1983, litigation in federal courts will proliferate. Since its enactment, FERPA has been subject to an extraordinary volume and variety of interpretations by students and parents. FPCO has issued hundreds of opinion letters that interpret the statute. *See* Dixie Snow Huefner & Lynn M. Daggett, *Commentary: FERPA Update: Balancing Access to and Privacy of Student Records*, 152 Ed. Law Rep. 469, 470 (2001); *see id.* ("What once seemed like a relatively straightforward statute has become a cumbersome set of requirements with ambiguous parameters."). Permitting a private right of action to enforce FERPA's extensive requirements would invite complainants to litigate in courts throughout the nation FPCO's voluminous technical interpretations of a statute that covers millions of students.

Under the ruling below, colleges and universities may be subject to suits for compensatory and punitive damages by students whenever law enforcement and other governmental authorities direct them to disclose student records. Although

FPCO has held that disclosure of student records in some such circumstances may fall within FERPA's "health or safety emergency" exception, *see* Andrea L. Foster, *Education Dept. Eases Student-Privacy Rules for FBI's Terrorism Investigation,* Chronicle of Higher Educ., Today's News (Sept. 21, 2001), *at* http://www.chronicle.com/daily/2001/09/20010921n.htm, a court or jury would not, of course, be bound by such a determination and could find a FERPA violation under specific facts. This Court should grant certiorari in this case to make clear that colleges and universities that comply with FPCO policy do not face a risk of additional, substantial damages in private FERPA suits.

The holding below would vastly expand the scope of private conduct subject to challenge in § 1983 suits. If private organizations are deemed to act under color of law whenever they make recommendations or certifications that may or may not be relied on by state entities, a broad array of private testing organizations, professional societies, and virtually every private college and university would be subject to claims under § 1983. That result would be contrary to precedent, destructive to the private organizations' freedom, and an open floodgate for lawsuits.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF WASHINGTON,

En Banc.

JOHN DOE,

Petitioner,

v.

GONZAGA UNIVERSITY, a Washington nonprofit corporation, JULIA M. LYNCH, ROBERTA S. LEAGUE, and SUSAN J. KYLE,

Respondents.

No. 69456-7

Argued Jan. 18, 2001
Decided May 31, 2001

IRELAND, J.

Petitioner John Doe sought review of a Court of Appeals' decision reversing the jury's award of damages (based on claims of defamation, negligence, invasion of privacy, violation of his rights under the Family Educational Rights and Privacy Act of 1974 (FERPA), and breach of contract) and remanding the case for retrial solely on the defamation claim.

We hold that the jury was properly instructed and that there is substantial evidence to sustain the jury's verdict on the defamation, invasion of privacy, violation of FERPA, and breach of contract claims. Because Gonzaga had no duty to investigate allegations against John Doe, there is no cognizable claim for negligence. Therefore, the Court of Appeals' decision is affirmed in part and reversed in part. The case is remanded to reinstate the judgment on all claims except negligence, which is to be dismissed.

FACTS

The witnesses presented widely divergent accounts of the facts in this case.

In late 1992, while John Doe was an elementary education student at Gonzaga University (Gonzaga), he had a sexually intimate relationship with Jane Doe, a student who was studying special education at Gonzaga. [1]

In October 1993, Roberta League (League), Gonzaga's teacher certification specialist, overheard student Julia Lynch (Lynch) talking with another student about Lynch's dissatisfaction with the way the school dealt with complaints of date rape. Lynch said that when she had been a resident assistant, she had observed Jane Doe in obvious physical pain, which Jane Doe said was the result of having sex with "John." Lynch was angry that no one from Gonzaga had bothered to find out what had happened.

League recognized the name "John"; she knew John Doe was a student teacher in the education program at Gonzaga. Two days later, League told Dr. Susan Kyle (Kyle),

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[1] Although the real names of the plaintiff and his sexual partner appear in the trial transcript, the plaintiff filed suit as "John Doe" and is so denominated here. As in the Court of Appeals' decision, John Doe's partner is identified as "Jane Doe."

Gonzaga's director of field experience for student teachers, what she had overheard. Kyle and League decided that they needed to investigate the situation. [2] League was concerned that the allegations she had overheard about John Doe might affect the dean's ability to submit an affidavit supporting John Doe's application for teacher certification. [3]

The two women met with Lynch on October 14, 1993. According to Lynch, Jane Doe told Lynch that John Doe had sexually assaulted her three times in late November or December 1992. Lynch also said that she accompanied Jane Doe to the student health center soon after the last assault, and the nurse concluded that Jane Doe had been date raped. [4]

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[2] Trial testimony showed that the investigation eventually included the following Gonzaga personnel: Julia Lynch, Chris Earnest, Roberta League, Susan Kyle, Janet Burcalow, Corrine McGuigan, Jon Sunderland, John Balog, Colleen Farrell, Sue Weitz, Kermit Rudolf, Father Coughlin, Vicki Loveland, Maureen Sheridan, William Sweeney, Vicki Howard, Cheryl Lepper, Tim McLaughlin, and Leo Driscoll.

[3] Applicants for certification are required to demonstrate their character and fitness for teaching, including a questionnaire, a fingerprint check, and an affidavit from the dean of the college or the school of education. The dean is to certify under penalty of perjury as follows:

> I swear (or affirm) that several faculty members have been contacted who personally know or knew _____, who is a candidate for certification. They have no knowledge and I have no knowledge that the applicant has been convicted of any crime or has a history of any serious behavioral problems.

Br. of Appellants at 5.

[4] At trial, Nurse Vicki Olson (Olson) testified that she did not perform a physical examination of Jane Doe. She recorded Jane Doe's subjective symptoms and scheduled an appointment for her

According to League and Kyle, Lynch said that Jane Doe claimed John Doe verbally coerced her into participating in "aberrant sexual behavior" with "other objects besides his penis," and urged Jane Doe to engage in multiple partner sex. [5] Clerk's Papers (CP) at 98, 195.

At the conclusion of the meeting, League and Kyle asked Lynch to see if Jane Doe would speak with them about her relationship with John Doe. Lynch did, and Jane Doe became angry and told Lynch that she did not want to make a complaint. Lynch told Kyle and League of Jane Doe's response.

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with Dr. Nancy Crotty (Crotty). When Olson asked Jane Doe if she wanted to report a rape, Jane Doe said no. Crotty testified that when she examined Jane Doe the following day, her findings were consistent with intercourse. Crotty testified that Jane Doe did not accuse John Doe of date rape or sexual assault. Crotty suggested that Jane Doe seek counseling if she felt that she had been unwillingly involved in intercourse. John Doe testified that Jane Doe told him the nurse or doctor had said the intercourse appeared forced. When John Doe asked Jane Doe, "Well, was it?", she responded, "I don't know. Was it?" Report of Proceedings (RP) at 366, 536.

[5] Lynch testified at trial that the conduct Jane Doe had described to her was normal, nonaberrant sexual activity. Lynch, League, and Kyle could not say at the time of trial what they discussed that led to references in the Kyle and League declarations to seamy and deviant activities and sexual penetration with foreign objects. Kyle admitted that she may have misunderstood, and that Lynch may only have spoken of John Doe's wanting to date two women simultaneously – not of proposing menage a trois. The women's conversation included discussion of whether there were erotic pictures in his room, whether John Doe was circumcised, and how often he changed his condoms.

League also contacted Adelle Nore, an investigator for the Office of the Superintendent of Public Instruction (OSPI), the state agency which certifies teachers. League and other Gonzaga personnel spoke with Nore by telephone numerous times about the allegations of John Doe's sexual misconduct, and League identified John Doe to Nore by name.

Nore testified that she believed Gonzaga personnel needed to speak with both John Doe and Jane Doe about the allegations. However, Gonzaga personnel did not ask her for her advice and did not tell Nore that they had not talked to John Doe. It was Nore's understanding in her conversations with League and Kyle that the alleged victim was credible and prepared to make a statement.

On October 28, 1993, Kyle met with Jane Doe, and told her about the date rape allegations. During the meeting, Jane Doe stated, "I guess I don't really know what rape is," and "I promised [John] I wouldn't tell." CP at 99. Jane Doe refused to make a formal statement.

After leaving Kyle's office, Jane Doe talked with Professor William Sweeney (Sweeney), who later described her as near hysteria and weeping uncontrollably. Sweeney testified that Jane Doe told him that John Doe had sexually assaulted her on three occasions, each time more violent and abusive, and that she screamed and tried to get away. According to Sweeney, Jane Doe also said that John Doe repeatedly threatened her life, and that she did not believe the university could protect her from him. [6]

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[6] Sweeney prepared a written declaration in which he stated that Jane Doe told him John Doe had "physically forced her, as well as verbally threatened her, to have both vaginal as well as anal intercourse." Clerk's Papers (CP) at 202. When questioned about the statement at trial, Sweeney testified that "[t]he 'anal' should have been 'oral' and I made a mistake in that." RP at 1389.

In January 1994, Jane Doe asked Janet Burcalow (Burcalow), chair of the department of teacher education, not to pursue the matter. But according to Burcalow, Jane Doe would not say that nothing happened, and Jane Doe admitted being afraid that John Doe would be angry if he found out she had talked about their relationship. Jane Doe testified that Burcalow told her that Burcalow already knew something bad had happened. Jane Doe told Burcalow these things were not true. Then Burcalow shook a finger at Jane Doe and asked her if she knew "where people who lie go." CP at 1886, 1925.

Cheryl Lepper, an instructor in the teacher education department, testified at trial that Jane Doe told her in the spring of 1993 that John Doe had forced Jane Doe to have sexual intercourse with him. According to Lepper, Jane Doe said John Doe had restrained her, forced her to have sex, and had then stalked her after she broke up with him.

In February 1994, Dr. Corrine McGuigan (McGuigan), dean of the school of education, met with League, Kyle, Burcalow, and Sweeney. McGuigan obtained written summaries of the narratives they presented to her, and later concluded that there was sufficient evidence of a serious behavioral problem to preclude her from signing the moral character affidavit supporting John Doe's application for teacher certification. [7]

John Doe first learned about Gonzaga's investigation of him on March 4, 1994, the same day he made his final payment of fees and tuition to Gonzaga. John Doe received a call asking him to come to McGuigan's office. He was escorted to a private room and left to read a letter from

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[7] McGuigan testified at trial that "it's easy for people's reputation to be slandered, specially in the case of a teacher if it is sexual misconduct that is alleged." RP at 1495.

McGuigan. The letter explained that in light of allegations of sexual assault, McGuigan would not give John Doe the moral character affidavit required to support his application for certification to teach. McGuigan refused to tell John Doe who had made the allegations against him. Testimony was also presented that when John Doe and his parents asked about their appeal rights, they were told there were none.

By the time of trial, Jane Doe had married and was attending graduate school in another state. Because she was unavailable, John Doe presented her testimony through portions of a 1997 videotaped deposition, which were shown to the jury. In both the videotaped deposition and a 1995 deposition, Jane Doe denied that John Doe had sexually assaulted her. She denied that she had made many of the statements that Gonzaga personnel attributed to her. She testified that Lynch had "really blown things out of proportion," and that there were falsehoods in the declarations of Kyle, Burcalow, and Sweeney. Report of Proceedings (RP) at 877. Jane Doe denied speaking about personal matters to Lepper. She testified that she had tried to dissuade Kyle and Burcalow from pursuing the allegations. Jane Doe felt that Burcalow "wasn't interested in hearing anything other than what she already believed." CP at 1887. Jane Doe told McGuigan that Gonzaga personnel were "wrong in their assumptions" about what had happened in her relationship with John Doe. *Id.* She testified that some of the things that happened in her sexual relationship with John Doe made her uncomfortable.

John Doe testified that he and Jane Doe had sexual intercourse on five occasions. He said he stopped when she seemed uncomfortable, and she never asked him to stop. John Doe presented the testimony of roommates that they never saw or heard any indication that Jane Doe was unwilling to engage in sexual intercourse. He presented the testimony of two former girl friends that John Doe never

pressured them to engage in sexual activity, never tried to talk them into sexual activity uncomfortable to them, and never criticized them for not engaging in sex. John Doe testified that he found "a lot of lies" when he read the declarations of League, Kyle, Burcalow, and Sweeney. RP at 449. The declarations made him disgusted and angry. John Doe said that Gonzaga destroyed his career in teaching, his goals, and his dreams.

PROCEDURAL HISTORY

In June 1994, John Doe brought an action against Jane Doe and Gonzaga. John Doe sued Jane Doe for falsely accusing him of sexual assault or rape; he sued Gonzaga for republishing the accusations "both between and among staff and faculty of Gonzaga and by reporting the same to the Office of the Superintendent of Public Instruction." CP at 13. John Doe sought to recover from Gonzaga for defamation, negligence, and breach of educational contract. He also brought a separate action against Lynch, League, and Kyle, individually, and the two actions were consolidated by stipulation.

Jane Doe cross-claimed against Gonzaga, alleging defamation and negligent investigation. She counterclaimed against John Doe for sexually assaulting her. John Doe and Jane Doe agreed to dismiss their claims against each other in September 1996.

Jane Doe later filed a notice of dismissal of her claims against Gonzaga, leaving only John Doe's claims against Gonzaga and its employees for trial. John Doe's amended complaint asserted claims for defamation, intrusion into his private affairs, and a 42 U.S.C. § 1983 claim for violation of 20 U.S.C. § 1232g(b) (FERPA) against all parties, and claims for negligence and breach of educational contract against Gonzaga.

Following a trial held in Spokane County Superior Court between March 17 and April 1, 1997, the jury returned a verdict in John Doe's favor, awarding him damages as follows:

Defamation	$ 500,000
Breach of Educational Contract	55,000
Negligence	50,000
Invasion of Privacy	100,000
Violation of "FERPA" Rights	150,000
Punitive Damages for FERPA Violation	300,000
TOTAL	$1,155,000

The trial court entered judgment on the verdict and also awarded John Doe attorney fees and costs under 42 U.S.C. § 1988.

Gonzaga appealed to the Court of Appeals, seeking review of the judgment and the trial court's rulings denying Gonzaga's posttrial motions and awarding attorney fees to the plaintiff. John Doe cross-appealed, seeking review of the trial court's order denying his motion for CR 26(g) sanctions. By order of the Court of Appeals, the matter was transferred from Division Three to Division One.

The Court of Appeals reversed the negligence, invasion of privacy, 42 U.S.C. § 1983, and breach of contract awards and remanded for a new trial on the defamation claim. The appellate court also held that the trial court abused its discretion in failing to impose CR 26(g) sanctions against Gonzaga for discovery abuse. The trial court was ordered "to impose an appropriate sanction on remand." *Doe v. Gonzaga Univ.*, 99 Wash. App. 338, 361, 992 P.2d 545 (2000).

This Court granted John Doe's petition for review of the Court of Appeals' decision. *Doe v. Gonzaga Univ.*, 141 Wash.2d 1023, 10 P.3d 1075 (2000).

ANALYSIS

Standard of Review

Questions of law are reviewed de novo. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994). Factual findings are reviewed under the substantial evidence standard: "The record must contain a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question." *Canron, Inc. v. Fed. Ins. Co.*, 82 Wash. App. 480, 486, 918 P.2d 937 (1996).

An appellate court may overturn a jury's verdict only if the verdict is "clearly unsupported by substantial evidence." *Burnside v. Simpson Paper Co.*, 123 Wash.2d 93, 108, 864 P.2d 937 (1994). The court may not substitute its judgment for that of the jury when there is evidence that, if believed, would support the verdict rendered. *Id.*

A trial court's evidentiary rulings are upheld on appeal absent an abuse of discretion. *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wash. App. 368, 372, 901 P.2d 1079 (1995). Abuse of discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

Issues [8]

In addition to certain evidentiary and procedural questions, the primary issues in this case may be stated as follows:

1. Whether Gonzaga or its employees may be held liable for defamatory statements made only among Gonzaga personnel.

2. Whether Gonzaga has a duty to exercise reasonable care in collecting information or investigating whether a candidate for certification as a teacher has a history of serious behavioral problems.

3. Whether a candidate for certification as a teacher waives his or her common law right to privacy.

4. Whether FERPA creates any right or privilege which can be enforced by individuals under 42 U.S.C. § 1983.

5. Whether statements in Gonzaga's bulletin and other publications agreeing to provide an opportunity for students to be heard in matters affecting their welfare constitute an enforceable contract with regard to Gonzaga's issuance of an affidavit for teacher certification.

1. Defamation

"In Washington, a defamation plaintiff must show four essential elements: falsity, an unprivileged communication, fault, and damages." *Commodore v. Univ. Mech.*

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[8] As a threshold matter, Gonzaga moves to strike John Doe's reply to Gonzaga's answer to the petition for review. A party may not reply to an answer unless the answer raises a new issue. RAP 13.4(d). In its answer, Gonzaga presented arguments as to why review should be denied. However, Gonzaga did not request that this Court address additional issues. Therefore, Gonzaga's motion to strike is granted.

Contractors, Inc., 120 Wash.2d 120, 133, 839 P.2d 314 (1992). Liability for defamation requires that the defamation be communicated to someone other than the person defamed; in other words, there must be a "publication" of the defamation. *Pate v. Tyee Motor Inn, Inc.*, 77 Wash.2d 819, 821, 467 P.2d 301 (1970). The Court of Appeals vacated John Doe's defamation award and directed that the jury be instructed on remand that Gonzaga cannot be held liable for communications among its own employees.

More than 80 years ago, this Court held that intracorporate communications are not "published" for purposes of defamation. "For a corporation ... acting through one of its agents or representatives, to send a libelous communication to another of its agents or representatives cannot be a publication of the libel on the part of the corporation. It is but communicating with itself." *Prins v. Holland-North Am. Mortgage Co.*, 107 Wash. 206, 208, 181 P. 680 (1919). The plaintiff there was a Seattle branch manager of a company headquartered in the Netherlands. The alleged defamation was contained in a letter sent by the main office and read only by the plaintiff's co-manager and a bookkeeper. The *Prins* court held that there had been no publication of the allegedly defamatory statements.

In the case before us, the Court of Appeals reasoned that, likewise, the conversations and memoranda between Gonzaga's employees regarding John Doe should be characterized as the university communicating with itself – not the kind of "publication" required to support a defamation claim.

John Doe contends that the common interests of a corporation's employees create only a qualified privilege. "A privileged communication involves the occasion where an otherwise slanderous statement is shared with a third person who has a common interest in the subject and is reasonably

entitled to know the information." *Pate*, 77 Wash.2d at 820-21, 467 P.2d 301. The plaintiffs in *Pate* were chambermaids who sued their employer and its supervisors for defamation. The alleged slander was a supervisor's statement that the plaintiffs were sneaking around joining a union – actions which amounted to Communism. The statement was made in a meeting attended by both the plaintiffs and nonunion housekeepers. The opinion noted that the supervisor had no duty to comment upon the ideology of unions in the ordinary course of her work, which took her statement outside the circumstances and principles of *Prins*.

Because the employees in *Prins* were clearly acting "within the limits of their employment," the court was not required to address the nature of any privilege on the communications among them. *Prins*, 107 Wash. at 208, 181 P. 680. However, when the supervisor in *Pate* made comments not "[i]n the ordinary course of her work," she could be held liable for publishing a defamatory statement to third persons, even though the third persons were also employees of the corporation. *Pate*, 77 Wash.2d at 821, 467 P.2d 301. Under these cases, intracorporate communications are not absolutely privileged. When a corporate employee, not acting in the ordinary course of his or her work, publishes a defamatory statement, either to another employee or to a nonemployee, there can be liability in tort for resulting damages.

In the instant case, from the evidence presented at trial, it could reasonably be found that Julia Lynch was not acting in the ordinary course of her work as an office assistant when she told another student that John Doe had injured Jane Doe during a sexual relationship. It could also be found that Roberta League was not acting in the ordinary course of her work as a certificate specialist when she eavesdropped on Lynch's conversation and shared her concerns of possible misconduct with Susan Kyle. Likewise, it could be found that Roberta League and Susan Kyle were not acting in the

ordinary course of their work when they questioned Lynch about alleged sexual assaults of Jane Doe by John Doe and then disclosed John Doe's identity and details about his sexual relations to Adelle Nore at OSPI.

The Court of Appeals reversed the trial court for refusing to give Gonzaga's proposed *Prins* jury instruction. However, the doctrine of *Prins* has been refined by *Pate*. The holding of *Prins* must be read in conjunction with the later holding of *Pate*. There is a qualified privilege for communications made between coemployees, but that privilege may be lost if the employees are not acting in the ordinary course of their work. The trial court's instructions fully encompassed the principles of publication and qualified privilege in a corporate context as announced in *Pate*. Therefore, the jury was properly instructed.

When a defendant has a qualified privilege to communicate a potentially defamatory statement, the privilege may also be lost by showing that the defendant made the statement with actual malice. *Caruso v. Local Union No. 690,* 107 Wash.2d 524, 530-31, 730 P.2d 1299 (1987). Actual malice exists when a statement is made "with knowledge of its falsity or with reckless disregard of its truth or falsity." *Herron v. KING Broad. Co.,* 109 Wash.2d 514, 523, 746 P.2d 295 (1987). "To prove actual malice a party must establish that the speaker knew the statement was false, or acted with a high degree of awareness of its probable falsity, or in fact entertained serious doubts as to the statement's truth." *Story v. Shelter Bay Co.,* 52 Wash. App. 334, 343, 760 P.2d 368 (1988).

The Court of Appeals held that the trial court's actual malice instruction was deficient because it failed to set forth the subjective nature of the reckless disregard standard. John Doe contends Gonzaga's own proposed instruction was deficient. Gonzaga's instruction reads as follows:

> "Actual malice" or "lack of good faith," when used in these instructions, means that the defendant knew that a statement was false or acted with reckless disregard as to whether a statement made was true or false. One acts with "reckless disregard for the truth or falsity of a statement" when one knows of the existence of information which would render a statement false and, nevertheless, without reasonable justification, disregards the information. The plaintiff has the burden of proving "actual malice" or "lack of good faith" by clear and convincing evidence.

CP at 1441.

The requested instruction sets forth the correct standard of proof clear and convincing evidence. However, it defines a knowingly false statement, not a statement made with recklessness. The case law cited by Gonzaga in support of its instruction tracks the language of the instruction given by the trial court. Gonzaga cannot be heard to complain.

Under Washington law, the trial court properly instructed the jury regarding the defamation claim. There was sufficient evidence for the jury to find that communications among Gonzaga personnel and statements made to OSPI were not privileged. Therefore, the jury's verdict and damage award for John Doe's defamation claim are reinstated.

2. Negligence

At trial, John Doe contended that when examining witnesses and investigating the details of his private life, Gonzaga owed a duty of care to conduct its investigation reasonably.

The language of former WAC 180-75-082 (1989), *repealed by* St. Reg. 97-04-088 (Mar. 8, 1997), the administrative regulation authorizing Gonzaga to collect information regarding a teacher certification candidate's potential behavioral problems, does not impose an affirmative duty on

the university to formally investigate a candidate's personal history.[9] In fact, the regulation requires only that a designated university official contact several faculty members who know or knew the applicant in order to ascertain whether they have any knowledge that the applicant has been convicted of a crime or has a history of any serious behavioral problems.

As noted by the Court of Appeals, no statute or administrative regulation applicable to this case imposed an affirmative duty on Gonzaga to investigate allegations of behavioral problems among its education students. Absent a duty to investigate, there can be no breach of duty. Although John Doe urged the courts below to imply a duty to act reasonably when Gonzaga voluntarily undertook to investigate, there is no basis to create such a duty.

Because Gonzaga had no duty to conduct an independent investigation, a claim of negligent investigation cannot be supported. The Court of Appeals properly reversed the judgment on John Doe's negligence claim, and the claim was not pursued before this Court.

3. Invasion of Privacy

"[T]he common law right of privacy exists in this state and ... individuals may bring a cause of action for invasion of that right." *Reid v. Pierce County*, 136 Wash.2d 195, 206, 961 P.2d 333 (1998).

The jury was properly instructed, based on *Restatement (Second) of Torts* § 652B (1977), concerning John Doe's claim –

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[9] At the time of the events in question, WAC 180-75 (1989) detailed the application process for teacher certification. The chapter was repealed in 1997 and was reenacted as a part of WAC 180-79A and 180-86.

With respect to plaintiff's claim for "invasion of privacy," the plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. An intentional intrusion, physically or otherwise, upon the solitude or seclusion of plaintiff, or his private affairs;

2. With respect to the matter or affair which plaintiff claims was invaded, that plaintiff had a legitimate and reasonable expectation of privacy;

3. The intrusion would be highly offensive to a reasonable person; and

4. That the defendant's conduct was a proximate cause of damage to plaintiff.

CP at 1478.

Gonzaga asserts that there was nothing "highly offensive" about its attempts to determine the facts about John Doe's relationship with Jane Doe. However, the jury heard testimony that Gonzaga personnel had inquired into the personal relationships, habits, and even anatomy of John Doe. Although state regulation authorizes officials from a teacher certificate applicant's school to contact faculty members regarding the applicant's history of serious behavioral problems, the provision does not contemplate an investigation by nonfaculty school personnel into the intimate details of a candidate's sex life:

> "Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters.... When these intimate details of his life are spread before the public gaze in a manner highly offensive to the

ordinary reasonable man, there is an actionable invasion of his privacy...."

Cowles Publ'g. Co. v. State Patrol, 109 Wash.2d 712, 721, 748 P.2d 597 (1988) (quoting *Restatement (Second) of Torts* § 652D, at 386 (1977)).

The jury was presented with sufficient evidence of Gonzaga's investigative activities to determine that John Doe's privacy had been invaded and that such an intrusion would be highly offensive to a reasonable person. The facts support John Doe's claim for invasion of privacy. The jury's verdict and damage award for this claim are reinstated.

4. FERPA

John Doe asserted Gonzaga's violation of his rights FERPA as the basis for his claims for damages under the Federal Civil Rights Act (42 U.S.C. § 1983). John Doe argues that Gonzaga violated FERPA by disclosing confidential information about him to OSPI.

The FERPA statute provides in pertinent part as follows:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents....[10]

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[10] The statute defines "education records" as "those records, files, documents, and other materials which ... contain information directly related to a student; and ... are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A).

When a student has reached 18 years of age, or is attending an institution of post-secondary education, required consent and

Gonzaga's alleged violation of FERPA rights grew out of a disclosure practice developed by Gonzaga personnel and OSPI. The jury heard testimony that Gonzaga personnel routinely called OSPI, before a student's application for certification was submitted, to talk about students as to whom they had "cause for concern" and to obtain advice. Nore testified that the calls about John Doe that OSPI received from League and others were typical of conversations she had with Gonzaga personnel. In preapplication conversations, Nore would often be told the names of the student candidates. Substantial evidence supports a determination that Gonzaga had a "policy or practice" of disclosing personally identifiable information contained in education records – in violation of FERPA.

Courts have held that FERPA itself does not give rise to a private cause of action. *E.g., Fay v. S. Colonie Cent. Sch. Dist.,* 802 F.2d 21, 33 (2d Cir. 1986). However, John Doe does not allege a private cause of action under FERPA. Instead, he asserts the FERPA violation as the basis for a claim under section 1983, which provides a remedy for violation of federally conferred rights. *Wilder v. Va. Hosp. Ass'n,* 496 U.S. 498, 509, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990).

The Supreme Court has provided guidance on the ability of a claimant to bring a section 1983 claim premised on the violation of a federal statute. To determine whether a particular statutory provision gives rise to a federal right, a court must examine the following three factors: (1) whether Congress intended the provision in question to benefit the plaintiff; (2) whether the right protected by the statute is so "vague and amorphous" that its enforcement would strain judicial competence; and (3) whether the statute imposes a

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rights accorded to the student's parents are to be accorded to the student. 20 U.S.C. § 1232g(d). 20 U.S.C. § 1232g(b)(1).

binding obligation on the states. *Blessing v. Freestone*, 520 U.S. 329, 329-30, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997).

Applying this three-factor test favors the conclusion that the FERPA provision at issue here gives rise to a federal right enforceable under section 1983.

First, the statute is intended to benefit students. The joint statement in explanation of FERPA states:

> The purpose of the Act is two-fold – to assure parents of students, and students themselves if they are over the age of 18 or attending an institution o[f] post-secondary education, access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent.

120 Cong. Rec. 39,862 (1974).

Second, the right is not so "vague and amorphous" that the court cannot enforce it. Courts routinely review the policies and practices of entities and individuals for statutory compliance.

Finally, the FERPA provision provides a binding obligation. If an educational institution does not require student consent before it releases educational records, "[n]o funds shall be made available under any applicable [federal educational] program." 20 U.S.C. § 1232g(b)(1).

The Court of Appeals relied on United States Supreme Court decisions regarding other federal statutes for guidance as to whether FERPA creates an enforceable individual right. [11] Reasoning by analogy from these cases, the Court of

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[11] The cases include *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987) (Brooke Amendment); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990) (Boren Amendment);

Appeals held that Gonzaga is not liable because "FERPA does not create individual rights privately enforceable under 42 U.S.C. § 1983." *Doe v. Gonzaga Univ.*, 99 Wash. App. at 357, 992 P.2d 545. However, the Supreme Court has not ruled on FERPA, the law at issue in this case.

Federal appellate decisions which have specifically addressed FERPA have held that the statute creates rights actionable under section 1983. [12] These well-reasoned decisions, which are directly applicable to the instant case, are more persuasive than those relied upon by the Court of Appeals. In the instant case, FERPA does create individual rights privately enforceable under section 1983.

In order to prevail on a section 1983 claim, "(1) the plaintiff must show that some person deprived ... [him or her] of a federal constitutional or statutory right; and (2) that person must have been acting under color of state law." *Sintra, Inc. v. City of Seattle*, 119 Wash.2d 1, 11, 829 P.2d 765 (1992). As discussed above, the statutory right at issue arises under FERPA.

Section 1983 itself provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to

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Suter v. Artist M., 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992) (Adoption Assistance and Child Welfare Act of 1980); and *Blessing v. Freestone*, 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997) (Title IV-D of the Social Security Act).

[12] *Falvo v. Owasso Indep. Sch. Dist. No. I 011*, 233 F.3d 1203 (10th Cir. 2000); *Brown v. City of Oneonta Police Dep't*, 106 F.3d 1125 (2d Cir. 1997); *Lewin v. Med. Coll. of Hampton Roads*, 931 F.Supp. 443 (E.D. Va. 1996), *aff'd*, 131 F.3d 135 (4th Cir. 1997); *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990); *Tarka v. Franklin*, 891 F.2d 102 (5th Cir. 1989).

> the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

Gonzaga argues that there was no substantial evidence that it was acting under color of state law. However, at trial, Janet Burcalow, who served for several years as the dean's designee, testified that Gonzaga acts for the State when it completes the moral affidavit for a student. Burcalow confirmed that she viewed the "Gonzaga certificate department as helping OSPI fulfill a duty that had been given to them by the legislature." RP at 829. When asked if there is a common interest between Gonzaga and OSPI, Burcalow responded, "Well, we work together on the matter of certification." RP at 861. Roberta League, Gonzaga's certification specialist, confirmed that Gonzaga is an agent of the State in the certification process. League testified about "my job in compliance with what I was supposed to do for the State of Washington for certification." RP at 759.

Whether the defendants were acting under color of state law is an issue of fact for the jury. Where there is joint action of the sort described at trial, the jury had substantial evidence to find that action under color of state law is present. *See Kuehn v. Renton Sch. Dist. No. 403,* 103 Wash.2d 594, 602, 694 P.2d 1078 (1985) (" 'It is enough that [a private person] is a willful participant in joint action with the State or its agents.' " (alteration in original) (quoting *Dennis v. Sparks,* 449 U.S. 24, 27, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980))).

As an alternative justification for its reversal of the jury's verdict on John Doe's FERPA claim, the Court of Appeals acted sua sponte in holding that "even if FERPA did create individual rights enforceable under § 1983, we would nonetheless hold that a teacher candidate *waives those rights*

when he or she applies for teacher certification." *Doe v. Gonzaga Univ.,* 99 Wash. App. at 357, 992 P.2d 545 (emphasis added). The Court of Appeals offers no statute, case law, or public policy in support of its holding.

Waiver is the intentional and voluntary relinquishment of a known right; it may be either express or implied. *Jones v. Best,* 134 Wash.2d 232, 241, 950 P.2d 1 (1998). To constitute implied waiver, there must be unequivocal acts or conduct evidencing an intent to waive; intent will not be inferred from doubtful or ambiguous factors. *Wagner v. Wagner,* 95 Wash.2d 94, 102, 621 P.2d 1279 (1980). Under the facts of this case, no such waiver by John Doe is demonstrated. In addition, John Doe's application for teacher certification had not been submitted to OSPI when personally identifiable information about his alleged sexual misconduct was communicated by Gonzaga. The Court of Appeals' holding that teacher candidates waive their FERPA rights enforceable under section 1983 when applying for certification cannot be supported.

At trial, evidence was presented to show that personally identifiable allegations of sexual misconduct were communicated to OSPI by Gonzaga. The allegations became part of the public record. The jury was properly instructed, and substantial evidence supported its unanimous award of punitive damages to John Doe. We reinstate the jury's verdict and damage awards for John Doe's FERPA claim.

5. Breach of Contract

Gonzaga argues that John Doe never articulated a coherent breach of contract theory. However, at trial, Gonzaga's student handbook was introduced. Under the heading "Mutual Responsibility," the handbook states as follows:

> The admission of a student to Gonzaga University and the student's acceptance of that admission constitute an

agreement of mutual responsibility. The student's obligation is to accept the published policies of the University and to act in a manner consistent with these policies. In turn, the University's responsibility is to provide an environment in which the student's educational goals may be achieved. The University also recognizes its obligation to provide students with an opportunity to be heard in matters affecting their welfare.

RP at 335-36.

The jury received the following proper instruction concerning the breach of contract claim:

> The relationship between a student and a university is primarily contractual in nature. Since a formal contract is rarely prepared, the general nature and terms of the agreement are usually implied. Specific terms can be found in the university bulletin and other publications.
>
> Implied contracts arise by inference or implication in some act or conduct. You may find implied contract by inference or implication from circumstances which, according to the ordinary course of dealing and people's common understanding, shows a mutual intention on the part of the parties to contract with each other.
>
> The interpretation of the terms of the contract that existed between Gonzaga and [John Doe] is for you to determine, from the university bulletin and other publications and from all of the facts and circumstances.

CP at 1471.

The jury was presented with Gonzaga's written representations concerning its agreement with its students and heard extensive testimony about the conduct of Gonzaga personnel toward John Doe. John Doe argued that Gonzaga breached its agreement by failing to discuss the sexual assault

allegations with him before reaching a final decision not to issue him an affidavit. John Doe testified that his long-term educational goal was to become a teacher. Sufficient evidence was presented for the jury to determine the existence, terms, and breach of a contract between Gonzaga and John Doe. The jury's verdict and damage award for John Doe's breach of contract claim are reinstated.

6. Evidentiary Issues

The trial court did not abuse its discretion in admitting four documents prepared by Gonzaga employees in anticipation of litigation or in refusing to admit the settlement agreement between John Doe and Jane Doe and the testimony of two witnesses disclosed by Gonzaga late in the trial.

7. Duplication of Damages

Gonzaga argues that the trial court judgment was excessive because the damages awarded by the jury on John Doe's claims overlap and are duplicative. The verdict form is actually structured so that the jury was required to consider each of the distinct claims for damages and to make individual determinations as to each defendant for each claim. In addition, the jury was instructed as follows:

> In this case plaintiff makes five separate claims for damages. Previously in these instructions the court has instructed you as to the elements of each claim and the burden of proof applicable to each claim. If you find that Plaintiff has not met his burden of proof on a claim then you need not and should not consider the issue of damages with respect to that claim.
>
> If, on the other hand, you find that Plaintiff has sustained his burden of proof with respect to a claim, then you should award any damage proved with respect to that claim.

CP at 1495.

Nothing in the verdict form or the jury instruction supports the argument that damages awarded on John Doe's claims overlap or are duplicative. In addition, when the verdict was entered, Gonzaga made no request for its clarification.

8. Discovery Sanctions

After document discovery and a series of depositions of Gonzaga employees in 1994, John Doe prepared a chronology of meetings and communications among Gonzaga personnel based on that discovery. He asked Gonzaga, by interrogatory, to review the document, to identify any inaccuracies, and to provide the dates and participants for any relevant meetings and communications not listed in the chronology.

Gonzaga objected to the interrogatory, asserting it was unduly burdensome and oppressive. Gonzaga answered by referring John Doe to depositions and to documents and answers to interrogatories already supplied by Gonzaga to him. Gonzaga also stated as follows: "All of the information supplied, in the aggregate, will support the accuracy or the inaccuracy of the 'chronology.' " CP at 1320. By this statement, Gonzaga implied that all responsive information was contained in material already produced.

About six weeks before the 1997 trial, through an independent motion, Gonzaga was ordered to produce documents earlier withheld on the basis of the attorney-client privilege or as attorney work product. In particular, John Doe obtained a chronology prepared in 1994 by Gonzaga personnel. John Doe claims the chronology contained references to meetings and conversations that Gonzaga had not previously disclosed, requiring John Doe to re-depose two witnesses.

John Doe filed a CR 26(g) motion for sanctions. The trial court found that he suffered no ultimate harm because the

document was eventually produced; therefore, the motion for sanctions was denied.

Civil Rule 26(g) requires an attorney to respond to a discovery request after making "reasonable inquiry," and to certify that the response is: (1) consistent with the rules, (2) not interposed for any improper purpose, and (3) not unreasonable or unduly burdensome or expensive. This Court has held that if a certification is made in violation of the rule, sanctions are mandated. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 355, 858 P.2d 1054 (1993).

In the case before us, the record reflects that Gonzaga responded to John Doe's interrogatory without making reasonable inquiry. It was unreasonable for Gonzaga's counsel not to ask his clients if Gonzaga personnel had, in fact, prepared a chronology of events. Gonzaga's representation that it would be unduly burdensome or unreasonable to provide a chronology was misleading in that it served to deflect a motion to compel a response to the interrogatory. Gonzaga's response was inconsistent with the spirit and intent of the rules. For these reasons, the Court of Appeals properly found that the trial court abused its discretion in failing to impose CR 26(g) sanctions against Gonzaga.

We affirm the Court of Appeals' order that the trial court impose an appropriate sanction against Gonzaga for violation of CR 26(g) on remand.

CONCLUSION

The Court of Appeals' decision is reversed and the judgment is reinstated on the jury verdict as to John Doe's claims for defamation, invasion of privacy, violation of his rights under FERPA, and breach of contract.

The Court of Appeals' rulings dismissing John Doe's negligence claim and remanding to the trial court for imposition of an appropriate sanction against Gonzaga for violation of CR 26(g) are affirmed.

The trial court's supplemental judgment for attorney fees and costs is reinstated, and John Doe is awarded reasonable attorney fees and expenses on appeal pursuant to RAP 18.1.

ALEXANDER, C.J., SMITH, JOHNSON, SANDERS, BRIDGE, CHAMBERS and OWENS, JJ., and BROWN, J.P.T., concur.

APPENDIX B

THE SUPREME COURT OF WASHINGTON,

JOHN DOE,

Petitioner,

v.

GONZAGA UNIVERSITY, a Washington nonprofit corporation, JULIA M. LYNCH, ROBERTA S. LEAGUE, and SUSAN J. KYLE,

Respondents.

No. 69456-7

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having considered Gonzaga's Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That Gonzaga's Motion for Reconsideration is denied.

DATED at Olympia, Washington this 10th day of August 2001.

Gerry L. Alexander
Chief Justice

APPENDIX C

COURT OF APPEALS OF WASHINGTON,

Division 1.

JOHN DOE,

Respondent/Cross-Appellant,

v.

GONZAGA UNIVERSITY, a Washington nonprofit corporation, JULIA M. LYNCH, ROBERTA S. LEAGUE, and SUSAN J. KYLE,

Appellants/Cross-Respondents.

No. 43437-3-I

Jan. 31, 2000

APPELWICK, J.

John Doe, a former student in Gonzaga University's department of education, sued Gonzaga and three of its staff members for spreading allegations that Doe had sexually assaulted another student, and for refusing to submit a moral character affidavit supporting Doe's application for teacher certification. The primary issues before us on appeal are whether any of the defendants can be liable for allegedly defamatory statements that Gonzaga employees made only to one another, and whether Gonzaga was entitled to judgment as a matter of law on Doe's claims for negligence, breach of educational contract, invasion of privacy, and violation of 42 U.S.C. § 1983. Holding in favor of Gonzaga on these issues, we reverse and remand for a new trial on the defamation claim only. We also reverse certain of the trial court's discovery and evidentiary rulings.

FACTS

On October 5, 1993, Roberta League, the certificate specialist in Gonzaga's school of education, overheard Gonzaga student Julia Lynch telling a friend the following:

> [W]hen I was an RA, my resident, [Jane Doe], was in obvious physical pain. She couldn't eat, she couldn't sleep, and she was having blood in her urine, stomach cramps, she said it was a result of having sex with [John Doe], this man she has been seeing, and no one from the school bothered to ask her any questions or find out what really happened. They had a little bit of information that she was hurt and tucked it away.

The conversation concerned League because John Doe, a student in the school of education, was at that time student teaching. Soon afterward, League discussed the matter with Dr. Susan Kyle, the director of field experience for student teachers at Gonzaga.

Kyle and League decided that they needed to investigate the situation further. They were concerned that the allegations League had overheard about John Doe might affect the dean's ability to submit an affidavit supporting Doe's application for teacher certification. Pursuant to RCW 28A.410.010, the Washington State Board of Education has promulgated rules governing the teacher certification process.

See WAC 180-77, 180-78, 180-86, 180-87, and former 180-75. The rules require a designated official from a certification applicant's school to contact several members of the faculty who know or knew the applicant. The dean must then swear that he or she and the faculty members consulted have "no knowledge that the applicant has been convicted of any crime and [have] no knowledge that the applicant has a history of any serious behavioral problems." WAC 180-75-082(3). [1]

On October 14, 1993, Kyle and League met with Lynch. According to written declarations that Kyle and League drafted in February 1994, which were admitted at trial, Lynch told them that Jane Doe had admitted to her that John Doe had sexually assaulted her three times, in late November or December, 1992. Lynch said further that Jane Doe had claimed that John Doe verbally coerced her into participating in 'aberrant sexual behavior' with 'other objects besides his penis,' and had urged her to engage in multiple partner sex. Lynch told League and Kyle that she had accompanied Jane Doe to the health center soon after the sexual assaults, and that the nurse had concluded that Jane Doe was date raped. At trial, however, Lynch testified that the behaviors Jane Doe had described to her were in fact normal, non-aberrant sexual activities, and that she did not remember telling League and Kyle about foreign objects. Lynch further testified that she did not remember whether Jane Doe had told her that John Doe said he wanted to sleep with more than one person at a time, only that she told her that he wanted to sleep with both Jane Doe and another girlfriend of his. League admitted at

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[1] WAC 180-75-082 was repealed, effective March 8, 1997. It was replaced by WAC 180-79A-155, which similarly requires a teacher candidate to submit a moral character affidavit from the school of education in support of the application for certification. The change in the law does not affect the outcome in this case.

trial that Lynch told her in the October 1993 meeting that Jane Doe had denied the rape allegations when Lynch spoke to Jane Doe in December 1992.

At the meeting with Kyle and League, Lynch agreed to approach Jane Doe. When she did, Jane Doe became angry and told Lynch that she did not want to pursue a rape charge.

Soon after conferring with Kyle, League telephoned Adelle Nore, a senior investigator with the Office of the Superintendent of Public Instruction (OSPI), which regulates teacher education programs. All together, Gonzaga personnel contacted Nore on at least six occasions in relation to the allegations against John Doe. During this initial conversation, League told Nore that a teacher education student had possibly date raped another student. League identified John Doe by name in a subsequent telephone call. Nore advised League to "talk to the girl who made the date rape charge in person." In her notes, Nore recorded that League had informed her that the "girl" was willing to come forward. Nore testified that her consistent understanding in her conversations with League and Kyle, was that the victim was credible and prepared to make a statement.

On October 28, 1993, Kyle met with Jane Doe, and told her about the date rape allegations. According to Kyle, Jane Doe would not comment on the relationship, and stated, "I guess I don't really know what rape is," and, "I promised [John Doe] I wouldn't tell. He made me promise." Jane Doe refused to make a formal statement.

Immediately after leaving Kyle's office, Jane Doe met with Professor William Sweeney. According to Sweeney, Jane Doe was "near hysteria" and weeping uncontrollably. Sweeney testified that Jane Doe told him during the meeting that John Doe had sexually assaulted her on three occasions, each time more and more violent and abusive, and that she had screamed and tried to get away. According to Sweeney,

Jane Doe also said that John Doe repeatedly threatened her life, and that she did not believe the university could protect her from him.

On January 26, 1994, Jane Doe met with Janet Burcalow, chair of the department of teacher education. Jane Doe tried to persuade Burcalow not to pursue the matter. But according to Burcalow, Jane Doe refused to say that nothing serious had happened in the relationship, and admitted being afraid of what might happen if John Doe found out she had talked about their relationship.

Cheryl Lepper, an instructor in the teacher education department, testified that Jane Doe had told her about the sexual assaults in the spring of 1993. According to Lepper, Jane Doe said that John Doe had restrained her and forced her to have sex, and had then stalked her after she broke up with him.

Some time in February 1994, Dr. Corrine McGuigan, the dean of the school of education, met with Kyle, Burcalow, League, and Sweeney. The dean concluded after the meeting that sufficient evidence of a serious behavioral problem precluded her from signing the affidavit supporting John Doe's application for teacher certification.

John Doe did not hear about Gonzaga's investigation into the date rape allegations until March 4, 1994. On that date, Doe was called into Dean McGuigan's office, where he was escorted to a private room, and left to read a letter that the dean had signed. The letter informed Doe that the dean would not give him the moral character affidavit required to support his application for certification to teach, due to the sexual assault allegations. Doe was not told who had made the allegations.

John Doe sued Jane Doe for defamation, and Gonzaga for defamation, negligence, breach of educational contract, and

violation of 42 U.S.C. § 1983 for releasing his name to OSPI in violation of the Family Educational Rights and Privacy Act (FERPA). Two years later, John Doe sued Lynch, League and Kyle separately. The two actions were consolidated.

Jane Doe counter-claimed against John Doe for sexual assault. John Doe and Jane Doe settled their lawsuit in 1996, dismissing their claims against each other.

A jury trial was held between March 17 and April 1, 1997 on the remaining claims. In response to pretrial and trial motions, the trial court made several rulings that are at issue in this appeal. The court admitted several documents that Gonzaga personnel had prepared at the request of corporate counsel, over Gonzaga's objections that the documents were protected by attorney-client privilege. The court refused to admit the settlement agreement between John Doe and Jane Doe. The court also refused to admit the testimony of two witnesses who came forward after trial had begun; both witnesses would have testified that Jane Doe had told them that she had been sexually assaulted by a boyfriend. Gonzaga offered the evidence not to prove the truth of the allegation, but to impeach Jane Doe's testimony that she had not used the terms 'rape' or 'date rape.'

By the time of trial, Jane Doe had moved to North Carolina and was unwilling to attend. Instead, John Doe presented Jane Doe's testimony through a 1997 videotaped deposition, portions of which were shown to the jury. In both the videotaped testimony and an earlier 1995 deposition, Jane Doe essentially denied both that John Doe had sexually assaulted her, and that she had made most of the statements that Gonzaga personnel attributed to her. Specifically, in her videotaped testimony, Jane Doe testified that Lynch had "really blown things out of proportion," and that there were "wild things" and other falsehoods in Kyle's, Sweeney's, and Burcalow's testimonies. She denied speaking to Cheryl

Lepper, using the word "rape," or being afraid for her life. Jane Doe testified that she had tried to dissuade Kyle and Burcalow from pursuing the allegations, but that the two women were "trying to get me to agree that this had happened," and were uninterested in hearing anything other than what they already believed. Jane Doe admitted, however, that some things had happened in her relationship with John Doe which had made her uncomfortable.

The jury returned a verdict for John Doe on all five theories of recovery. The jury awarded damages in the following amounts:

Defamation	$ 500,000
Invasion of Privacy	100,000
Violation of "FERPA" Rights	150,000
Punitive Damages for FERPA Violation	300,000
Breach of educational contract	55,000
Negligence	5[illegible],000
TOTAL	$1,155,000

The jury was not instructed to segregate the damages, and did not specify which of Gonzaga's wrongful behaviors gave rise to which damages. Gonzaga now appeals.

DEFAMATION

A. *Prins* Instruction

The first issue before us is whether the trial court properly instructed the jury regarding the defamation claim. Gonzaga asked the court to instruct the jury that neither Gonzaga nor the individual defendants could be liable for communications

made only among Gonzaga personnel. The court rejected the instruction. We hold that the court's decision was in error.

Jury instructions are sufficient if they permit each party to argue his or her theory of the case, are not misleading, and when read as a whole, properly inform the trier of fact of the applicable law. *State v. Rice,* 110 Wash.2d 577, 603, 757 P.2d 889 (1988).

Communications made only among corporate personnel are not published for the purposes of defamation. *Prins v. Holland-North America Mortgage Co.,* 107 Wash. 206, 208, 181 P. 680 (1919). In *Prins,* the Court held that a letter from one officer of a corporation to another did not constitute publication because a corporation acting through its agents and employees "is but communicating with itself." 107 Wash. at 208, 181 P. 680.

Consistent with the *Prins* rule, Gonzaga University could not be liable for any defamatory communications made only among its employees. Here, the rule shields the individual defendants as well; after all, the corporation can speak to itself only through the individuals who work for it. Therefore, the trial court erred in rejecting Gonzaga's proposed *Prins* instruction.

Moreover, the court's error was not harmless. Testimony at trial focused primarily on the communications that Gonzaga personnel made only among themselves. The only allegedly defamatory statements that fall outside the *Prins* exception are those made to Adelle Nore at OSPI. Because the error was not harmless, we reverse the defamation award and remand for a new trial on that claim. On remand, the trial court is instructed to give the jury a *Prins* instruction.

B. Actual Malice Instruction

Gonzaga also contests the trial court's defamation jury instructions on the ground that they misstate the standard for

determining whether the communications at issue were protected by a qualified privilege. John Doe responds that the error was not properly preserved because Gonzaga's proposed instruction was deficient.

A claim that the trial court has applied an incorrect standard of proof under the First Amendment may be considered for the first time on appeal, because it is an issue affecting fundamental constitutional rights. *Richmond v. Thompson,* 130 Wash.2d 368, 385, 922 P.2d 1343 (1996). Therefore, even if Gonzaga's proposed instruction was deficient, it may raise the issue for the first time on appeal.

Here, Gonzaga had a qualified privilege to make the allegedly defamatory statements at issue. The WAC provision governing Gonzaga's role in the teacher certification process, gives Gonzaga a qualified privilege to contact several members of the faculty and staff about an applicant's potential behavioral problems. *See* WAC 180-79A-122(3). This same provision also implicitly grants Gonzaga a qualified privilege to seek guidance from OSPI regarding the certification process. If not for this qualified privilege, schools like Gonzaga would be discouraged from investigating claims of a future teacher's potential behavioral problems. The ultimate purpose of the qualified privilege is to protect school children.

When a defendant like Gonzaga has a qualified privilege to communicate potentially defamatory statements, the privilege may be lost by showing that the defendant made the statements with actual malice. *Parry v. George H. Brown & Assocs., Inc.,* 46 Wash. App. 193, 197, 730 P.2d 95 (1986); *Story v. Shelter Bay Co.,* 52 Wash. App. 334, 342, 760 P.2d 368 (1988). Actual malice exists when a statement is made with knowledge of its falsity or with reckless disregard of whether it was false or not. *Richmond v. Thompson,* 130 Wash.2d 368, 376, 922 P.2d 1343 (1996). "[R]eckless

disregard" is a subjective standard, and requires the plaintiff to prove that the speaker "acted with a high degree of awareness of [the statement's] probable falsity, or in fact entertained serious doubts as to [its] truth." *Story,* 52 Wash. App. at 343, 760 P.2d 368. A plaintiff cannot show actual malice by merely showing that a defendant unreasonably failed to investigate the truth of a statement. *See Parry v. George H. Brown & Assocs., Inc.,* 46 Wash. App. 193, 197, 730 P.2d 95 (1986). But when a speaker does in fact conduct an investigation and the investigation does not support the false statement or brings to the speaker's attention facts that rebut the false statement, that is evidence from which a jury can infer reckless disregard. *Herron v. KING Broadcasting Co.,* 112 Wash.2d 762, 776 P.2d 98 (1989).

Here, the court correctly instructed the jury that the statements at issue were protected by a qualified privilege, and that John Doe had to prove by clear and convincing evidence that Gonzaga had made the statements with actual malice. The jury was further instructed that, "abuse of privilege occurs if the maker of the allegedly false and defamatory statement knew, at the time the statement was made, that the statement was false, or acted with reckless disregard as to the truth or falsity of the statement." But the court did not define "reckless disregard" for the jury. Gonzaga argues that the court's instruction is deficient because it failed to make clear to the jury that "reckless disregard" is a subjective standard. Gonzaga contends that the jury could have incorrectly inferred that an unreasonable failure to investigate the truth of the date rape allegations was evidence of recklessness.

Gonzaga's argument is well taken. On remand, the court is directed to instruct the jury regarding the subjective nature of the "reckless disregard" standard.

SECONDARY CLAIMS

Gonzaga next argues that the trial court erred in failing to grant it a directed verdict on the remaining claims of negligence, invasion of privacy, violation of 42 U.S.C. § 1983, and breach of educational contract. In reviewing a trial court's decision to deny a motion for directed verdict, we apply the same standard as the trial court. A directed verdict is appropriate if, when viewing the material evidence most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party. *Industrial Indem. Co. of the Northwest v. Kallevig,* 114 Wash.2d 907, 915-16, 792 P.2d 520 (1990).

A. Negligence

Gonzaga asserts it is immune from liability for negligent reporting about John Doe, pursuant to RCW 4.24.510. We agree with John Doe, that this claim is an affirmative defense which may not be raised for the first time on appeal. We do not decide that the defense does or does not have application to these facts.

Gonzaga next argues that it cannot be liable for negligence in this case because it had no duty to John Doe to exercise reasonable care in collecting information regarding his potential behavioral problems. John Doe responds that we should create or extend such a duty. There are no cases interpreting the WAC provision that governs Gonzaga's role in the teacher certification process, to guide us in addressing this issue.

The WAC provision authorizing Gonzaga to collect information regarding a teacher certification candidate's potential behavioral problems does not expressly impose a duty on the university to investigate formally any unfavorable allegations that arise. *See* WAC 180-75-082. To the contrary, WAC 180-75-082 requires only that a designated official of an applicant's school contact several faculty

members who know or knew the applicant. Only if both the school official and the faculty members consulted have "no knowledge that the applicant has a history of any serious behavioral problems" may the dean sign an affidavit under penalty of perjury supporting the candidate's application. WAC 180-75-082.

In arguing that Gonzaga owed him a duty to investigate, John Doe analogizes the present case to several cases that address Department of Social and Health Services (DSHS) caseworkers' duties in reporting child abuse allegations. In those cases, Washington courts held that caseworkers have a duty to exercise reasonable care when investigating child abuse allegations. But the caseworker cases are distinguishable because a statute and administrative regulations impose a duty to investigate on caseworkers. *See Lesley v. Department of Soc. and Health Servs.,* 83 Wash. App. 263, 273, 921 P.2d 1066 (1996) ("[A] specific statute provides that DSHS caseworkers have a duty to investigate. RCW 26.44.050. A cause of action for negligent investigation thus exists against DSHS caseworkers."); *Yonker v. Department of Soc. and Health Servs.,* 85 Wash. App. 71, 81-82, 930 P.2d 958 (1997) (RCW 26.44.050 imposed duty to investigate reports of possible occurrence of child abuse); *Dunning v. Pacerelli,* 63 Wash. App. 232, 239, 818 P.2d 34 (1991) (DSHS caseworkers potentially liable for negligent investigation into allegations of child abuse).

In the alternative, John Doe contends that Gonzaga did undertake an investigation in this case, and that once it began the investigation, it owed a duty to Doe not to be negligent. But the cases that Doe cites in support of this argument are not on point. In those cases, the courts held that a person who chooses to assist another, even gratuitously, inducing reliance on that assistance, may be liable for failure to exercise reasonable care. *See Alston v. Blythe,* 88 Wash. App. 26, 943 P.2d 692 (1997); *Roth v. Kay,* 35 Wash. App. 1,

664 P.2d 1299 (1983); *Sheridan v. Aetna Cas. & Sur. Co.*, 3 Wash.2d 423, 100 P.2d 1024 (1940). These principles are inapplicable here because Gonzaga did not undertake to render aid or warn John Doe.

WAC 180-75-082 requires the applicant for certification to submit an affidavit about the applicant's criminal history, serious behavioral problems and past teaching history. The applicant must also submit an affidavit of good moral character and personal fitness from the designated official at the school of education. The regulation provides that the applicant must submit a statement, as opposed to an affidavit, if it is not possible for the school official to execute an affidavit with the required content. In that statement, the applicant must explain why it is impossible or impractical to obtain the affidavit. In all respects the only duty imposed is on the applicant.

The affidavit from the school of education contemplates signature under penalty of perjury. The school official must attest to contacting "several faculty" who know or knew the applicant. The regulation does not require contacting all faculty who know or knew the applicant, nor those who know or knew the applicant best, nor even anyone who knew the applicant most recently. The scope of the effort is up to the school.

The affidavit, if filed, must indicate that the affiant and the several faculty contacted have no knowledge that the applicant has not been "convicted of any crime," nor that the applicant has "a history of any serious behavioral problems." The regulation provides no further definition of "crime," "serious behavioral problems" or "knowledge." The answers from the faculty may be wholly subjective as a result. Any consulted faculty member's belief, based on rumor or personal observation that an applicant had a serious

behavioral problem, is enough to prevent the execution of the school's affidavit.

Clearly, this regulation does not contemplate the kind of investigation undertaken by child protective services.

Schools of education have a vested interest in seeing their graduates certificated. The inability or unwillingness of the school to provide the affidavit is evidence of concerns that overcome this vested interest. These concerns about criminal conduct and serious behavioral problems are issues that OSPI should hear about and should investigate. It is in the interest of school children and the public to have such reporting by the schools of education and investigation by OSPI.

We find no basis for the creation of a new duty on the part of the school of education to conduct an independent investigation. That is a legislative prerogative that we will not exercise. The judgment on the negligence claim is therefore reversed.

B. Invasion of Privacy

Gonzaga next argues that it is entitled to judgment as a matter of law on the invasion of privacy claim. We hold that the facts here do not support a claim for invasion of privacy.

John Doe's invasion of privacy claim is based on *Restatement (2d) of Torts* § 652B (1977): "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." The common law right to privacy exists in Washington, and individuals may bring a cause of action for invasion of that right. *Reid v. Pierce County*, 136 Wash.2d 195, 206, 961 P.2d 333 (1998).

The evidence here is insufficient to support a claim for invasion of privacy. Again, WAC 180-75-082 authorizes officials from a teacher certificate applicant's school to contact several faculty members regarding the candidate's potential behavioral problems. The provision also implicitly authorizes school officials to consult with OSPI regarding their concerns about particular students. In this process, the school personnel must be able to discuss highly personal matters, which may reasonably be offensive to the certificate candidate in another context. But the candidate waives his right to object to those discussions on the grounds of invasion of privacy once he identifies himself as a potential candidate for teacher certification. Gonzaga did not invade John Doe's privacy to any greater degree than what the WAC provision contemplates. Therefore, we reverse the invasion of privacy judgment.

C. 42 U.S.C. § 1983

Gonzaga next argues that the court erred in refusing to grant it a directed verdict on the 42 U.S.C. § 1983 claim. Gonzaga argues that it cannot be liable under 42 U.S.C. § 1983 because the federal law at issue, Family Educational Rights and Privacy Act (FERPA), does not create any right or privilege that private individuals can enforce under § 1983. Again, we agree.

The Federal Civil Rights Act, 42 U.S.C. § 1983, provides for a private cause of action when a state violates certain federal statutory rights. *See Maine v. Thiboutot,* 448 U.S. 1, 4, 100 S.Ct. 2502, 2504, 65 L.Ed.2d 555 (1980). Section 1983 provides a remedy for violation of federally conferred rights, not simply violation of federal law. *See Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 509, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990).

A court must ask three questions in deciding whether a federal statute gives rise to an enforceable right under § 1983:

(1) whether the provision in question was intended to benefit the plaintiff; (2) whether the right protected by the statute is so "vague and amorphous" that its enforcement would strain judicial competence; and (3) whether the statute imposes a binding obligation on the state. *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 509, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990); *Blessing v. Freestone,* 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997).

The question before us is whether FERPA creates a federal right that individuals can enforce under § 1983. U.S. Supreme Court case law provides guidance in answering this question. In *Wright v. City of Roanoke Redev. and Hous. Auth.,* 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987), the Court considered whether the Brooke Amendment gave rise to individual rights enforceable under § 1983. The Brooke Amendment and its implementing regulations imposed a ceiling on the rent which public housing projects could charge low-income tenants. The regulations defined rent to include charges to tenants for " 'reasonable amounts of utilities,' " and defined how that amount would be determined. *Wright,* 479 U.S. at 420-21 n.3, 107 S.Ct. 766 quoting 24 CFR § 860.403 (1982). The Court held that the law was intended to benefit tenants, who could therefore sue to enforce the law under § 1983. *Wright,* 479 U.S. at 432, 107 S.Ct. 766. In *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990), the Court considered whether the Boren Amendment to the Medicaid Act created individual rights enforceable under § 1983. The Boren Amendment required the states to reimburse Medicaid providers according to rates that were " 'reasonable and adequate' " to meet the costs of " 'efficiently and economically operated facilities.' " *Wilder,* 496 U.S. at 503, 110 S.Ct. 2510, quoting 42 U.S.C. § 1396 (1982). Again the Court held that the law was intended to benefit providers seeking reimbursement, who could therefore challenge the state's rates by suing under § 1983. In both *Wilder* and

Wright, the laws at issue were enforceable under § 1983 because they were intended to provide particular and well-defined benefits to the plaintiffs.

In two later cases, however, the Court held that certain federal laws did not confer substantive rights on the plaintiffs. In *Suter v. Artist M.,* 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992), the Court considered whether private individuals had the right to enforce by suit a provision of the Adoption Assistance and Child Welfare Act of 1980. The act required participating states to submit a plan to the Secretary of Health and Human Services. The plan had to provide that the state would make "reasonable efforts" to avoid removing children from their homes, and to return children to their homes. *Suter,* 503 U.S. at 351, 112 S.Ct. 1360. The Court held that the act did not create an enforceable right under § 1983 because the term "reasonable efforts" imposed "only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary." *Suter,* 503 U.S. at 363, 112 S.Ct. 1360. In *Blessing v. Freestone,* 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997), custodial parents whose children were eligible to receive child support services from the state pursuant to Title IV-D of the Social Security Act, sued the director of Arizona's child support agency under § 1983. The act required participating states to certify that they would operate a child support enforcement program in "substantial compliance" with the act, and would submit a detailed plan to the Secretary of Health and Human Services. The Court held that the act did not create individual rights enforceable under § 1983 because:

> [f]ar from creating an individual entitlement to services, the ['substantial compliance'] standard is simply a yardstick for the Secretary to measure the system-wide performance of a State's Title IV-D program. Thus, the Secretary must look to the aggregate services provided by the State, not to whether the needs of any particular person have been satisfied.

Blessing, 520 U.S. at 343, 117 S.Ct. 1353. In both *Suter* and *Blessing,* the federal laws at issue did not create individual substantive rights enforceable against the states because they were not intended to confer particular benefits on the plaintiffs.

The case currently before us is more akin to *Suter* and *Blessing* than to *Wilder* and *Wright.* The federal law at issue, FERPA, provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . or personally identifiable information contained therein . . . of students without the written consent of their parents." 20 U.S.C. § 1232g(b). Like the federal law at issue in *Blessing,* FERPA requires participating schools to have in place a system-wide plan; the law is not intended to ensure that "the needs of any particular person have been satisfied." *Blessing,* 520 U.S. at 343, 117 S.Ct. 1353. We hold FERPA does not create individual rights privately enforceable under 42 U.S.C. § 1983. Therefore, we reverse the 42 U.S.C. § 1983 judgment.

Furthermore, even if FERPA did create individual rights enforceable under § 1983, we would nonetheless hold that a teacher candidate waives those rights when he or she applies for teacher certification. WAC 180-75-082 requires the candidate to file an affidavit from the school of education as a precondition for the state's award of a teacher certificate. In the affidavit, the dean must certify that he or she and several faculty members who know the applicant have "no knowledge that the applicant has a history of any serious behavioral problems." WAC 180-75-082. Moreover, the WAC provision implicitly authorizes school officials to contact OSPI directly with questions regarding the

certification process. This process necessarily entitles the school to release personally identifiable information to OSPI. Gonzaga's actions did not exceed its authority in this case.

D. Breach of Contract

Gonzaga finally argues that it is entitled to judgment as a matter of law on the breach of contract claim. Gonzaga argues that any implied agreement between John Doe and Gonzaga does not apply to moral character affidavits. Once again, we agree.

In its student handbook, Gonzaga states that the admission of a student to the university constitutes an "agreement of mutual responsibility." The "student's obligation is to accept the published policies of the University and to act in a manner consistent with these policies." In return, "the University's responsibility is to provide an environment in which the student's educational goals may be achieved." In the same paragraph, Gonzaga further states that it "recognizes its obligation to provide students with an opportunity to be heard in matters affecting their welfare." In another section, the handbook also specifies that the university will follow certain notice and hearing procedures when disciplining students who misbehave. John Doe's theory at trial was that Gonzaga breached this "agreement" by failing to discuss the sexual assault allegations with him before reaching a final decision not to issue him an affidavit.

Without addressing whether the student handbook creates any enforceable substantive or procedural rights with respect to purely internal issues, we hold that the student handbook does not confer substantive or procedural rights with respect to WAC 180-75-082(3), which governs Gonzaga's responsibilities to the state in regard to the moral character affidavit of applicants for teacher certification. Therefore, Gonzaga is entitled to judgment on the contract claim as a

matter of law, and we reverse the award for breach of contract.

Even if we did not reach this result, we would nonetheless strike the contract damages as duplicative. The jury was instructed to consider only economic injury in deciding how much compensation to award on the breach of contract claim. The only economic injury that John Doe alleged was the injury to his career resulting from Gonzaga's release of his name to OSPI, and its decision not to sign the moral character affidavit. These injuries flowed directly from the allegedly defamatory communications. Therefore, the contract damages duplicate the defamation damages.

EVIDENTIARY AND DISCOVERY ISSUES

A. Work Product Documents

Gonzaga argues that the trial court abused its discretion in ordering it to disclose, and admitting into evidence, four documents that Gonzaga personnel prepared at the direction of corporate counsel. In his cross-appeal, John Doe argues that the court erred in refusing to impose sanctions on Gonzaga for its failure to produce one of those documents.

1. Discoverability

John Doe sought to discover four documents that certain Gonzaga employees had prepared in anticipation of litigation in this case. Of greatest concern here is a six-page chronology that Roberta League and Susan Kyle prepared, which listed relevant dates and the events that occurred on those dates. Gonzaga argued below that the chronology was not discoverable because it was protected by attorney-client privilege. The trial court disagreed, characterizing the document as work product. The court allowed discovery of the document, finding that John Doe had substantial need for it and could not obtain the information that it contained in

any other way. Gonzaga argues again on appeal that the documents are privileged.

Documents prepared by a client or his or her attorney "in anticipation of litigation" are characterized as work product. CR 26(b)(4). Work product is not discoverable unless the party seeking discovery can show that he "has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." CR 26(b)(4). John Doe concedes that the four documents are work product. We cannot say that the trial court abused its discretion in determining the issues of "substantial need" or "undue hardship." We therefore affirm these rulings by the trial court.

Because John Doe now is familiar with the documents, and can obtain the information they contain by deposing the relevant witnesses, he cannot show substantial need for them on remand. Gonzaga is not required to produce them on remand, and the documents remain privileged and inadmissible.

2. Discovery Sanctions

In his cross-appeal, John Doe argues that the trial court should have imposed sanctions on Gonzaga for failing to produce the chronology in response to an interrogatory. We review sanctions decisions for abuse of discretion. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 338, 858 P.2d 1054 (1993). We hold that the trial court abused its discretion here.

Upon completion of early discovery in this case, John Doe pieced together an initial chronology of Gonzaga's internal meetings and communications regarding the sexual abuse allegations. John Doe then provided Gonzaga with this chronology, along with an interrogatory asking Gonzaga to

identify any communications and meetings not reflected in the chronology. Gonzaga did not answer the interrogatory, claiming that it was "unduly burdensome [and] oppressive." Gonzaga assured John Doe that he already had all the information he needed to answer the interrogatory. Several years later, through an independent motion, John Doe's counsel finally received the chronology at issue. John Doe claims the chronology contained numerous references to meetings that Gonzaga had not previously disclosed, requiring him to re-depose two witnesses. John Doe filed a CR 26(g) motion for sanctions. The trial court found that John Doe had suffered no harm because he ultimately obtained possession of the chronology; the court therefore denied the motion for sanctions.

The relevant rule here is CR 26(g), which requires an attorney to respond to a discovery request after making "reasonable inquiry," and to certify that the response is: (1) consistent with the rules, (2) not interposed for any improper purpose, and (3) not unreasonable or unduly burdensome or expensive. Whether an attorney has made a reasonable inquiry is to be judged by an objective standard. *Fisons*, 122 Wash.2d at 343, 858 P.2d 1054. The purpose of CR 26(g) is to encourage a "spirit of cooperation and forthrightness during the discovery process." *Fisons*, 122 Wash.2d at 342, 858 P.2d 1054. Sanctions are mandatory if the court finds that a party violated the rule. *Fisons*, 122 Wash.2d at 346, 858 P.2d 1054.

Here, the record reflects that Gonzaga responded to the interrogatory without making reasonable inquiry. Gonzaga's counsel could have responded to the interrogatory by asking his clients to provide a chronology of relevant events based on their own knowledge. After all, Roberta League had already prepared a chronology for Gonzaga. Gonzaga's response was also misleading. Relying on Gonzaga's assurances that he already had all the relevant information,

John Doe did not move to compel a response. Gonzaga's response was inconsistent with the spirit and intent of the rules. The court therefore abused its discretion in failing to impose a sanction, and is ordered to impose an appropriate sanction on remand.

In determining an appropriate sanction, the trial court has wide latitude. *Fisons,* 122 Wash.2d at 356, 858 P.2d 1054. The court must impose the least severe sanction that will be adequate to serve its purposes, but the sanction should not be so minimal that it undermines those purposes. *Fisons,* 122 Wash.2d at 356, 858 P.2d 1054. The purposes of sanctions are to deter, to punish, to compensate and to educate. *Fisons,* 122 Wash.2d at 356, 858 P.2d 1054.

B. Settlement Agreement

Gonzaga next argues that the trial court abused its discretion in refusing to admit the settlement agreement between John Doe and Jane Doe. Gonzaga claims the settlement agreement is relevant in determining the credibility of Jane Doe's testimony. We agree.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. Lynch,* 58 Wash. App. 83, 792 P.2d 167 (1990).

According to ER 408, evidence of a settlement agreement is not admissible to prove whether a party is liable on a particular claim. But the rule "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness." ER 408. The purpose of the rule is to encourage parties to make whatever admissions may lead to a successful compromise without sacrificing portions of their case in the event these efforts fail. Comment ER 408.

Here, John Doe's and Jane Doe's settlement agreement and release provides that John Doe may resume his lawsuit

against Jane Doe if any new evidence surfaces suggesting that Jane Doe has accused him of sexual assault. The agreement therefore is probative of the truth of Jane Doe's claims in her videotaped testimony that John Doe never assaulted her. Furthermore, Gonzaga did not offer the settlement agreement as a means of proving Jane Doe's liability; she was no longer a party to the lawsuit. ER 408 allows admission of a settlement agreement for Gonzaga's intended purpose – to prove Jane Doe's bias. Therefore, the trial court abused its discretion in excluding the settlement agreement. The court is instructed to admit evidence of the agreement on remand.

C. Impeachment Evidence

Gonzaga argues that the trial court abused its discretion in refusing under ER613 to allow Gonzaga to admit the testimony of two witnesses who were disclosed late into the trial. Gonzaga offered the testimony for the purposes of proving that Jane Doe had made prior statements inconsistent with her deposition testimony at trial. However, we need not reach this issue in light of our decision to remand the case.

CONCLUSION

We reverse and remand for a new trial on the defamation claim. On remand, the trial court must include a *Prins* jury instruction. The court must also define "reckless disregard" for the jury in a manner that makes clear the subjective nature of that standard. We reverse the negligence, invasion of privacy, 42 U.S.C. § 1983, and breach of contract judgments. On remand, Gonzaga need not produce the four work product documents. The settlement agreement between Jane Doe and John Doe, and the testimony of Ashlock and Green, are admissible.

REVERSED and REMANDED.

AGID, A.C.J., and ELLINGTON, J., concur.

DEC 19 2002
CLERK

No. 01-679

IN THE

Supreme Court of the United States

GONZAGA UNIVERSITY and ROBERTA S. LEAGUE,

Petitioners,

v.

JOHN DOE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE WASHINGTON SUPREME COURT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Cited Authorities	ii
Statutory Provisions Involved	1
Introduction	1
Statement of the Case	2
Reasons for Denying the Writ	11
I. The Joint Participation Of Gonzaga And The Office Of The Superintendent Of Public Instruction In The FERPA Violation And Gonzaga's Defense Of The Offending Disclosures As State-Directed Brings The Circumstances Of This Case Squarely Within This Court's "State Action" Jurisprudence.	11
II. Virtually No Conflict Exists Within The Federal Courts As To FERPA's Creation Of Federal Rights.	15
III. The Overwhelming Majority Of Federal Courts Have Correctly Decided The Issue Of Whether FERPA Creates Rights In Students And Their Parents Under All Of The Court's Precedents, Including *Suter v. Artist M.* And *Blessing v. Freestone.*	19
Conclusion	27
Appendix — Relevant Statutes And Regulations	1a

TABLE OF CITED AUTHORITIES

	Page
Cases:	
Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144, 45 F. Supp.2d 664 (D. Minn. 1999)	16
Adams v. Lewis University, 1999 US Dist. LEXIS 3413 (N.D.Ill. 1999)	16
Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)	11
Altschuler v. University of Pennsylvania Law School, 1997 WL 129394 (SDNY 1997)	16
Belanger v. Nashua Sch. Dist., 856 F. Supp. 40 (D.N.H. 1994)	16
Blessing v. Freestone, 520 U.S. 329, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997)	*passim*
Brentwood Academy v. Tennessee Secondary School Athletic Association, et al., 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001)	12, 14
Brouillet v. Cowles Pub. Co., 114 Wash. 2d 788, 791 P.2d 526 (1990)	5
Brown v. City of Oneonta, 106 F.3d 1125 (2d Cir. 1997)	16

Cited Authorities

	Page
Cort v. Ash, 422 U.S. 66 (1975)	17
Cullens v. Bemis, No. 91-73980, 1992 WL 337688 (1992)	16
Doe v. Knox County Bd. Of Ed., 918 F.Supp. 181 (E.D.Ky. 1996)	16
Falvo ex rel. Pletan v. Owasso Indep. Sch. Dist. No. I-011, 233 F.3d 1203 (10th Cir. 2000), *cert. granted*, 150 L. Ed. 2d 715, 121 S. Ct. 2547 (2001)	16
Fay v. South Colonie Cent. Sch. Dist., 802 F.2d 21 (2d Cir. 1986)	16
Flagg Bros., Inc. v. Brooks, 98 S. Ct. 1729, 436 U.S. 149 (1978)	11
Francois v. University of District of Columbia, 788 F. Supp. 31 (D.D.C. 1992), *aff'd*, 1993 US App. LEXIS 5051 (App. D.C.)	16
Gundlach v. Reinstein, 924 F. Supp. 684 (E.D.Pa.1996)	15, 16, 17, 18
Hartfield v. East Grand Rapids Pub. Sch., 960 F. Supp. 1259 (W.D. Mich. 1997)	16

Cited Authorities

Page

Joseph M. ex rel Kimberly F. v. Southeast Deco School District, 2001 WL 283154 (E.D. Pa. 2001) 17

Krebs v. Rutgers, 797 F. Supp. 1246 (D.N.J. 1992) 16

Lugar v. Edmondson Oil Co., 457 U.S. 922, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982) 12, 14

Maynard v. Greater Hoyt Sch. Dist. No. 61-4, 876 F. Supp. 1104 (D.S.D. 1995) 16

Meury v. Eagle-Union Community Sch. Corp., 714 N.E.2d 233 (Ind. App. 1999) 19

National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 109 S. Ct. 454, 102 L. Ed. 2d 469 (1988) 12

Norris v. Board of Educ. of Greenwood Community School Corp., 797 F. Supp. 1452 (S.D. Ind. 1992) 18, 19

Norwood v. Slammons, 788 F. Supp. 1020 (W.D. Ark. 1991) 16

Sean R. v. Board of Educ., 1992 U.S. Dist. LEXIS 11713 (D.C.Conn. 1992) 16

Cited Authorities

Page

Sirohi v. Trustees of Columbia University, 1996 US Dist. LEXIS 1737 (SDNY 1996) 16

Smith v. Duquesne University, 612 F. Supp. 72 (W.D. Pa. 1985) 17, 18

Suter v. Artist M., 503 U.S. 347 (1992) 19, 20, 21, 22, 23, 24

Tarka v. Cunningham, 917 F.2d 890 (5th Cir. 1990) 16

United States v. The Miami University, 91 F. Supp.2d 1132 (S.D. Ohio 2000) 16

Warner v. St.Bernard Parish School Bd., 1998 WL 50016, 1998 US Dist. LEXIS 1360 (E.D.La. 1998) 16

Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990) ..... *passim*

Wright v. Roanoke Redevelopment & Housing Auth., 479 U.S. 418 (1987) ..... *passim*

Page

United States Constitution:

Fourteenth Amendment 12

Statutes:

20 U.S.C. § 1232g 1

20 U.S.C. § 1232g(b) 17

42 U.S.C. § 1232g(b)(1) 23, 27

42 U.S.C. § 1232g(b)(1)(B) 24

42 U.S.C. § 1232g(b)(1)(F) 24

42 U.S.C. § 1232g(b)(2) 27

42 U.S.C. § 1232g(b)(3) 24

42 U.S.C. § 1232g(b)(5) 24

42 U.S.C. § 1232g(d) 23

42 U.S.C. § 1232g(e) 24

42 U.S.C. § 1232g(f) 22

42 U.S.C. § 1232g(4)(A) 24

Page

42 U.S.C. § 1232(2)(A) 23

42 U.S.C. § 1232g(4)(B) 24

42 U.S.C. § 1983 ..... *passim*

Washington Administrative Code, 180-75-082(3) ... 3

Washington Administrative Code, 180-79A 3

Washington Administrative Code, 180-86 3

St. Reg. 97-04-088 3

Other Authorities:

99 C.F.R. pt. 99 1

34 C.F.R. § 99.4 25

34 C.F.R. § 99.5 25

34 C.F.R. § 99.30(a) 25

34 C.F.R. § 99.30(b) 25

34 C.F.R. § 99.32 25

34 C.F.R. § 99.33 25

34 C.F.R. § 99.67(a)(1)-(3) 23

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, and regulations promulgated thereunder by the Secretary of the Department of Education, 99 C.F.R. pt. 99, are set forth in the appendix.

INTRODUCTION

This case presents the unusual situation of a disclosure practice between a private college and a state agency under which sensitive education record information about students was casually and routinely shared, without the students' consent and outside of the disclosures permitted or required by state regulation. The disclosure practice violated the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA), to which both the private college and the state agency were subject. The suit below — which originally did not include a claim under 42 U.S.C. § 1983, but only state law claims — was brought by a student injured when false allegations that he had stalked and raped another student passed, as a result of this disclosure practice, from the privacy of his education records into the "public record" environment of the state agency. A claim under § 1983 was added when the private college defended on the basis that its offending disclosures were required by state law and were in response to instructions from the state agency, and that its employees were acting for the state in making the disclosures.

The Court's review is not warranted. The conflict which Petitioner suggests exists with the Third Circuit Court of Appeals is not implicated by this case, which did not involve an isolated education record disclosure but rather (as pointed out by the Washington Supreme Court) the type of "policy

or practice" of offending disclosures which is unambiguously forbidden by FERPA. And although private colleges do not often act "under color of state law," the private college's defense that its offending disclosure practice was requested and required by state agents brings the circumstances of this case squarely within the Court's state action jurisprudence. Finally, because the case presents unusual facts, including the convergence of a private defendant and no allegation of a Constitutional deprivation, a decision in this case would have limited application.

STATEMENT OF THE CASE

As the Washington Supreme Court acknowledged, the witnesses presented widely divergent accounts of the facts in this case. Gonzaga's Petition persists in citing only the inconsistent and discredited testimony of its own employees. Despite consistent testimony from the witnesses having personal knowledge of the relationship between John Doe and Jane Doe that no stalking or rape ever occurred; despite the jury's determination that John Doe was defamed and substantially damaged; and despite the jury's finding of conduct on Gonzaga's part sufficiently blameworthy to support an award of punitive damages, Gonzaga persists in its Petition in referring to John Doe as an "alleged assailant." The jury determined by clear and convincing evidence that Gonzaga's reports of sexual misconduct on John Doe's part were false and that they were made with actual malice.

Nor, as the Petition states, was Gonzaga confronted with "another student's accusation that [John Doe] sexually assaulted her." Gonzaga's investigation was prompted not by a complaint by any victim, but by an interloper, Julia Lynch. Gonzaga personnel admitted knowing from the

outset of the investigation that Jane Doe denied she had been raped when Lynch spoke to her in December 1992 (Petitioner's App. 32a) and that Jane was angry to learn in October 1993 that Lynch had brought the subject up again; again refusing to make a complaint. (Petitioner's App. 4a.) As observed by the Washington Supreme Court, by the time the case went to trial, Jane Doe had testified consistently in two depositions that she had not been sexually assaulted nor had she accused John Doe of sexual assault. (Petitioner's App. 7a.)

Matters germane to John Doe's § 1983 claim are not fully described by the Petition. On March 4, 1994, Doe, a recent graduate of Gonzaga's teacher education program, who was in the process of completing his application for teacher certification, made his final payment of fees and tuition to Gonzaga. That same day, he received a call from the office of the Dean of the School of Education, telling him that he needed to come in to see Dean Corrinne McGuigan. When Doe arrived at McGuigan's office, he was escorted to a private room. The dean handed him a letter without comment and then left him to read it. The letter stated that because of allegations of sexual assault against him, the source of which was not identified, the dean would not give him the moral character affidavit required to support his certification to teach.

The dean's moral character affidavit required at the time by § 180-[illegible]-082(3) of the Washington Administrative Code (WAC)[1] was one of a number of documents that teacher education graduates applying to teach in Washington schools

1. As noted by Petitioners, WAC 180-75-082(3) (1989) was repealed by St. Reg. 97-04-088 (Mar. 8, 1997) and reenacted as part of WAC 180-79A and 180-86.

were required to submit to the Office of the Superintendent of Public Instruction (OSPI). The dean was required to prepare the affidavit by conferring with several faculty members who personally knew the student applicant and then to attest, if appropriate, that neither the faculty members nor the dean have "knowledge that the applicant has been convicted of any crime or has a history of any serious behavioral problems." Other documents the applicant was required to obtain and file to demonstrate his character and fitness included, *inter alia*, the applicant's own moral character affidavit, a questionnaire including character references, and a fingerprint check.

Through the student-controlled application process prescribed by the regulations, Gonzaga enjoyed the opportunity, consistent with the requirements of FERPA, to provide notice to OSPI of moral character concerns about teacher education graduates seeking state certification.[2] The formal regulatory process insured that OSPI would get the needed information, but through a procedure in which a student who received a qualified affidavit (an affidavit in which the dean identified knowledge of criminal convictions or a history of serious behavioral problems) could seek to correct any error in the dean's information. And since it was the student's obligation to procure and provide the affidavit, a student would have the ultimate option, if the dean's affidavit information would be embarrassing or fatal to the application, of not applying for certification at all. That this was an important option for applicants had been demonstrated

2. Disclosure of any education record information would be permitted under FERPA, where it was the student who was required to procure the affidavit and submit it, or authorize it to be submitted, to OSPI. As contemplated by the regulations, consent by the student to disclosure would be an inherent part of the process.

by the Washington Supreme Court's decision in *Brouillet v. Cowles Pub. Co.*, 114 Wash. 2d 788, 791 P.2d 526 (1990), which held that reports to OSPI of concerns of sexual misconduct on the part of teachers were public records subject to public disclosure. Indeed, the Supreme Court had required disclosure in *Brouillet* of reports of sexual misconduct received by OSPI even where the accused teacher had voluntarily resigned based on administrative guarantees of confidentiality. 114 Wash. 2d at 794.

Upon reading Dean McGuigan's letter, Doe demanded to know who was making allegations of sexual assault against him. McGuigan would not say. Doe immediately walked to the office of the college's Corporation Counsel and demanded to know from him who was making the allegations. Corporation Counsel would not say. Doe gave explicit written instruction to Gonzaga following the meeting not to forward any affidavit to OSPI without his review and approval. Trial Exhibit 217. When Doe and his parents asked about his rights to appeal the determination, they were told there were none.

Doe then made a demand under FERPA for Gonzaga's records pertaining to the dean's letter and the claimed allegations of sexual assault. Trial Exhibit 4. It was through education records released to him in response to his FERPA request that he learned that an "investigation" had been going on since the prior October. He learned that the investigation was prompted when Roberta League, the school's certification officer, overheard a conversation in which Julia Lynch expressed dissatisfaction that the school declined to investigate Lynch's concern, one year before, that Jane Doe had complained of sexual pain resulting from intercourse with John Doe. (Petitioner's App. 2a.) League recognized John Doe's name as that of a teacher education student.

Through Doe's FERPA request, he learned that the ensuing investigation had been incompetently conducted[3] and resulted in the generation of a number of records reflecting shockingly false allegations about his and Jane's relationship, including allegations of multiple violent rapes and sodomy, including with foreign objects. Trial Exhibit 6.

Doe also learned at about the same time that his right under state certification regulations to control his own application and not to have damaging information forwarded to OSPI without his consent, and his right under FERPA to seek correction of Gonzaga's records were in each case moot, since League and others had already "informally" shared personally-identifiable information about the allegations with OSPI personnel. Doe's instruction to Gonzaga not to pass along the allegations had been pointless. The allegations had been passed along in violation of FERPA months earlier, and were already reflected in OSPI's files. Trial Exhibit 34.

Doe sued Gonzaga University and Jane Doe for defamation and Gonzaga for invasion of privacy, breach of contract and negligence. Gonzaga responded by defending its conduct on grounds that in providing information "informally" to OSPI, it had been abiding by instructions from the state. Gonzaga affirmatively defended against Doe's claims by contending that "Gonzaga University and its agents were acting pursuant to statutory authority and/or public policy and are absolutely immune from any and all claims herein made by plaintiff." (Answer, Affirmative Defenses, Counterclaim & Third Party Complaint, p. 7, CP 30.) In a

3. The jury found Gonzaga liable for negligence and awarded damages for that claim. The Washington Supreme Court reversed that part of the award, holding that Gonzaga had had no "duty" to conduct the investigation in the first place. Petitioner's App. at 16a.

counterclaim and third party complaint for declaratory relief, Gonzaga asked the court to determine that its employees' passing along this damaging information to OSPI was required by its partnership with OSPI in the teacher certification process:

> 1.6 Defendant's actions were mandated by the laws and regulations of the State of Washington. Defendant seeks declaratory judgment from this Court finding that the University is obligated by law to report the information it received pertaining to the incidents involving John Doe and Jane Doe to the Office of the Superintendent of Public Instruction in order that the Office of the Superintendent of Public Instruction could determine whether further investigation of John Doe's application for teaching certificate was necessary. . . .
>
> 1.8 In the course of performing its duty to report knowledge and information of good moral character and personal fitness of plaintiff, defendant Gonzaga University contacted the OSPI to ascertain whether the allegations by Jane Doe against plaintiff were such that they needed to be reported to the OSPI. The OSPI confirmed that defendant was required to report allegations of this type to the OSPI and directed defendant to report the information.
>
> 1.9 Since Gonzaga University was acting in accordance with instructions from the OSPI and OSPI administrative procedures when it

> reported the information pertaining to plaintiff, the administrative agency is a proper and necessary party to this litigation which involves interpretation and enforcement of statutes and regulations which the agency is required to implement.
>
> 1.10 Gonzaga University justifiably relied upon and deferred to the direction given by the authorized agents of the OSPI.

(Answer, Affirmative Defenses, Counterclaim & Third Party Complaint, pp. 7-9, CP 30-32.) Gonzaga then filed a motion for summary judgment dismissal of the defamation claims, contending that its actions were "absolutely privileged," and in support filed the affidavit of Roberta League. League elaborated on the working relationship with and direction taken from the state:

> Upon request, from time to time OSPI provides guidance and advice to the various approved teacher education programs in regard to issues relating to student teacher preparation and certification of prospective teachers. In our meetings and discussions with OSPI, concern for assuring the fitness and suitability of student teachers and applicants for teacher certification are periodically discussed. In those discussions, those concerns are recognized and acknowledged to be shared, common concerns of both OSPI and our School of Education in carrying out our respective roles as to student preparation and certification. A close working relationship exists between OSPI and the personnel in the Gonzaga

> University School of Education who, respectively, are involved in teacher certification matters. After I began working as a Certification Specialist at Gonzaga University, during training which I received from OSPI, I was advised that if information came to my attention regarding behavioral problems which might be of concern to me relative to a student's fitness for teaching and certification, such should be brought to OSPI's attention for purposes of review and possible investigation by OSPI.
>
> Accordingly, from time to time I have contacted and consulted with Adelle Nore in the Office of Professional Practices (OPP) of OSPI to gain advice and guidance regarding behavioral or other issues which I thought might be of concern and which might be pertinent to the WAC 180-75-082(3) affidavit which the Dean of our School of Education would be called upon to provide for an applicant. It was in that context that I contacted OSPI in regard to matters which had come to my attention relating to John Doe (the plaintiff in Cause No. 94-203120-6 pending in Spokane County Superior Court). In doing so, I acted in good faith in carrying out what I considered to be my responsibility owing to Gonzaga University, to OSPI and to the public.

Trial Exhibit 45. It was following these averments by Gonzaga that its FERPA violations had been state-directed that John Doe amended his complaint to include a claim under § 1983.

That Gonzaga and OSPI were both complicit in the FERPA violation was borne out by evidence at trial. As summarized by the Washington Supreme Court, the testimony of OSPI investigator Adelle Nore and others established that state personnel and Gonzaga had settled into an extra-regulatory, unconsented-to information-sharing process, violative of FERPA, whereby Gonzaga personnel would give Nore a heads up on prospective applicants who might present "cause for concern." Because "cause for concern" was the standard, the information-sharing practice was self-selective for information damaging to students:

> Gonzaga's alleged violation of FERPA rights grew out of a disclosure practice developed by Gonzaga personnel and OSPI. The jury heard testimony that Gonzaga personnel routinely called OSPI, before a student's application for certification was submitted, to talk about students as to whom they had "cause for concern" and to obtain advice. Nore testified that the calls about John Doe that OSPI received from League and others were typical of conversations she had with Gonzaga personnel. In preapplication conversations, Nore would often be told the names of the student candidates. Substantial evidence supports a determination that Gonzaga had a "policy or practice" of disclosing personally identifiable information contained in education records — in violation of FERPA.

(Petitioner's App. at 19a.)

Based on evidence of Gonzaga's policy and practice of passing along damaging personally-identifiable education record information about teacher education students — and

in John Doe's case, spurious allegations of rape and stalking, which were passed into the public records environment of a state agency — the jury awarded Doe $150,000 in actual damages. The jury was properly instructed on the standards for awarding punitive damages and was presented with evidence as to the tens of millions of dollars in federal funds received by Gonzaga annually in exchange for its undertakings to protect student privacy rights.[4] The jury unanimously awarded Doe $300,000 in punitive damages.

REASONS FOR DENYING THE WRIT

I. THE JOINT PARTICIPATION OF GONZAGA AND THE OFFICE OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION IN THE FERPA VIOLATION AND GONZAGA'S DEFENSE OF THE OFFENDING DISCLOSURES AS STATE-DIRECTED BRINGS THE CIRCUMSTANCES OF THIS CASE SQUARELY WITHIN THIS COURT'S "STATE ACTION" JURISPRUDENCE.

A claim under § 1983 embodies at least two elements. The plaintiff is first bound to show that they have been deprived of a right "secured by the Constitution and laws" of the United States. They must secondly show that the defendant deprived them of this right acting "under color of state law." The Court has held it clear that these two elements denote two separate areas of inquiry. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970); *Flagg Bros., Inc. v. Brooks*, 98 S. Ct. 1729, 1733, 436 U.S. 149 (1978).

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4. Evidence showed that in the four academic years preceding the time of trial, Gonzaga's receipt of federal funds had ranged between $23 million and $30 million each year. Trial Exhibit 54.

Where it is alleged that the right deprived was a right secured by the Constitution, answering the first, "deprivation" element ordinarily advances a determination whether the defendant was a "state action." With limited exceptions, there can be no Constitutional deprivation absent "state action." Thus, in a number of the cases cited by Petitioner and which deal with alleged deprivations of due process, one can not determine whether there was a deprivation of due process without determining the issue of state action. If there is no state action, then no process is Constitutionally due.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the Court discussed the relationship between the "state action" requirement of the Fourteenth Amendment and the "color of state law" requirement of § 1983, and concluded that conduct that constitutes "state action" for Fourteenth Amendment purposes also constitutes action "under color of state law" for purposes of § 1983. It noted, however, that the converse was not necessarily true, n.18, 457 U.S. at 935. Although the Court continues to note this distinction between Constitutional cases and cases involving deprivations of rights under federal laws, there is a tendency, where the presence of "state action" will satisfy the "color of state law" requirement, to use the terms and standards interchangeably. *See National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988), *Brentwood Academy v. Tennessee Secondary School Athletic Association, et al.*, 531 U.S. 288 n.2 (2001). In Constitutional cases, the second, "color of state law" element is effectively answered by answering the first, "deprivation" element.

Where, as here, the deprivation alleged is one of rights under federal laws having application to public and private

actors, however, the deprivation element can be answered first and independently. Thus, in this case, Gonzaga could be found to have deprived John Doe of a right under FERPA without first asking whether Gonzaga was a state actor, because FERPA is equally applicable to private institutions accepting federal funding. There need be no general "state action" evaluation into the background or purpose for Gonzaga's and OSPI's dealings. Having found the very specific deprivation of John Doe's rights under FERPA — Gonzaga's passing along allegations of rape and stalking as a part of its extra-regulatory, unconsented-to information-sharing practice with OSPI — one turns to the second element of whether that information-sharing took place "under color of state law."

Petitioner's argument about the "color of state law" issue fails to consider the specific deprivation that requires review for its state action incidents. Petitioner treats the case as if the deprivation being complained about were that Gonzaga "made a recommendation to the state," (Pet. for Cert., p. 17), or that it "complied with a state law requirement that a university official submit moral character affidavits to OSPI," *id.*, or that it merely "suppl[ied] information that pertains to a government decision," (Pet. for Cert., p. 18.)

But the deprivation of FERPA rights was the extra-regulatory unconsented-to conversations themselves, and the passing-along of damaging information from private education records to the public records of a state agency. The state was a party to those conversations. The state encouraged those conversations. Indeed, according to the League Affidavit, notwithstanding that the state was likewise subject to FERPA, state agents "trained" Gonzaga personnel that such conversations could and should take place. And

both League and Dr. Janet Burcalow, Gonzaga's dean's designee, having had the state training, testified that they viewed themselves as acting for the state in their communications with OSPI about certification. (Petitioner's App., at 22a.)

This Court has described its decisions in the state action area as seeking to assure that constitutional standards are invoked "when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains," such that "the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed." *Brentwood Academy v. Tennessee Secondary Sch. Ath. Ass'n, et al.*, 531 U.S. 288, 295 (2001). The Court has consistently held that the issue of state action is a "necessarily fact-bound inquiry." *Id.*, 531 U.S. at 298, citing *Lugar*, 457 U.S. at 939. The Court's recent decision in *Brentwood Academy* surveyed a "host of facts" that prior decisions established can bear on the fairness of attributing private action to the state:

> We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," *Blum, 457 U.S. at 1004,* when the State provides "significant encouragement, either overt or covert," *ibid.* or when a private actor operates as a "willful participant in joint activity with the State or its agents," *Lugar, supra, at 941* (internal quotation marks omitted). We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," *Pennsylvania v. Board of Directors of City Trusts*

> *of Philadelphia, 353 U.S. 230, 231, 1 L. Ed. 2d 792, 77 S. Ct. 806 (1957) (per curiam)*, when it has been delegated a public function by the State, cf., *e.g., West v. Atkins, supra, at 56; Edmonson v. Leesville Concrete Co., 500 U.S. 614, 627-628, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991)*, when it is "entwined with governmental policies" or when government is "entwined in [its] management or control," *Evans v. Newton, 382 U.S. 296, 299, 301, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966).*

The Washington Supreme Court correctly held that given OSPI's joint participation in, and encouragement of, the FERPA violation, "color of state law" was properly an issue of fact for the jury. (Petitioner's App., at 22a.)

II. VIRTUALLY NO CONFLICT EXISTS WITHIN THE FEDERAL COURTS AS TO FERPA'S CREATION OF FEDERAL RIGHTS.

The Petition greatly overstates the extent of conflict in the case law as to whether FERPA violations are actionable deprivations of rights under § 1983. Contrary to the Petition, the Washington Supreme Court's decision does not conflict with the Third Circuit Court of Appeals' summary affirmance at 114 F.3d 1172 (3d Cir. 1997) of *Gundlach v. Reinstein*, 924 F. Supp. 684 (E.D.Pa.1996). Both decisions acknowledge — Washington's explicitly, and the Eastern District of Pennsylvania's implicitly — that FERPA creates rights in students and their parents to be free from a school's "policy or practice" of violative disclosures. And at the present time, there is no conflict among the Courts of Appeals; all reviewing the issue have held that FERPA does create

rights that can be redressed in actions brought under § 1983. *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986) and *Brown v. City of Oneonta*, 106 F.3d 1125, 1131 (2d Cir. 1997); *Tarka v. Cunningham*, 917 F.2d 890, 891 (5th Cir. 1990), *Falvo ex rel. Pletan v. Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203 (10th Cir. 2000), *cert. granted*, 150 L. Ed. 2d 715, 121 S. Ct. 2547 (2001). A number of district courts have reached the same conclusion.[5]

In *Gundlach*, the district court did not hold that no plaintiff could seek redress for a FERPA violation under § 1983, but only that "Mr. Gundlach cannot seek redress pursuant to a FERPA-based § 1983 claim *under the facts alleged in support of the proposed claim*." 924 F. Supp. at

5. The following decisions hold that FERPA creates rights actionable under 42 U.S.C. § 1983: *Belanger v. Nashua Sch. Dist.*, 856 F. Supp. 40, 47-48 (D.N.H. 1994), *Sean R. v. Board of Educ.*, 1992 U.S. Dist. LEXIS 11713 (D.C.Conn. 1992), *Altschuler v. University of Pennsylvania Law School*, 1997 WL 129394 (SDNY 1997), *Sirohi v. Trustees of Columbia University*, 1996 US Dist. LEXIS 1737 (SDNY 1996), *Krebs v. Rutgers*, 797 F. Supp. 1246 (D.N.J. 1992), *Warner v. St.Bernard Parish School Bd.*, 1998 WL 50016, 1998 US Dist. LEXIS 1360 (E.D.La. 1998), *Doe v. Knox County Bd. Of Ed.*, 918 F.Supp. 181, 184 (E.D.Ky. 1996), *citing unpublished Sixth Circuit decision, Cullens v. Bemis*, No. 91-73980, 1992 WL 337688 (1992), *Hartfield v. East Grand Rapids Pub. Sch.*, 960 F. Supp. 1259 (W.D. Mich. 1997), *Adams v. Lewis University*, 1999 US Dist. LEXIS 3413 (N.D.Ill. 1999), *Maynard v. Greater Hoyt Sch. Dist. No. 61-4*, 876 F. Supp. 1104, 1107 (D.S.D. 1995), *Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144*, 45 F. Supp.2d 664, 673 (D. Minn. 1999), *Francois v. University of District of Columbia*, 788 F. Supp. 31 (D.D.C. 1992), *aff'd*, 1993 US App. LEXIS 5051 (App. D.C.), *United States v. The Miami University*, 91 F. Supp.2d 1132 (S.D. Ohio 2000), *Norwood v. Slammons*, 788 F. Supp. 1020, 1026 (W.D. Ark. 1991).

692 (emphasis added). Indeed, the district court in *Gundlach* held that a careful reading of § 1232g(b) reveals "a Congressional intention to impose a mandatory obligation on participating institutions, such that it may not have in place a 'policy or practice of permitting the release of education records.'" What the court viewed as actionable, then, was a release of such record information as a matter of policy or practice. As noted by the court, however, "since Mr. Gundlach has failed to allege that Defendants maintain a policy . . . but instead bases his claim on one instance of alleged noncompliance, we would conclude that the Congress has not unambiguously expressed the 'right' he seeks to enforce." *Id.* at 690 n.7. The unreported decision in *Joseph M. ex rel Kimberly F. v. Southeast Deco School District*, 2001 WL 283154 (E.D. Pa. 2001) dealt only with a plaintiff's request for litigation sanctions based on the defendant's filing of unredacted education records with the court, in violation of both FERPA and an interim order requiring filing under seal. The court's denial of the sanctions, citing *Gundlach*, 2001 WL 283154 at *10, is fully consistent with the isolated nature of the disclosure and the absence of any policy or practice.

Smith v. Duquesne University, 612 F. Supp. 72 (W.D. Pa. 1985), also cited by Petitioner as conflicting, was not a § 1983 case, but addressed whether FERPA created an implied right of action; an issue decided with reference to *Cort v. Ash*, 422 U.S. 66, 78 (1975). *Smith* likewise held, in addressing the purpose of the statute, that FERPA was adopted to address systematic, "not individual," violations of students' privacy and confidentiality rights. 612 F. Supp. at 79. Respondent knows of no case which has adopted the absurd view that an institution's release of educational records in violation of FERPA must be uniform and pervasive

to be actionable. The notion that an institution could have any policy or practice of disclosure falling short of universal would render FERPA meaningless, indeed. What has been required of plaintiffs in stating a claim, including by *Gundlach* and *Smith v. Duquesne*, is a "policy or practice" of releasing personally-identifiable information in some context.

John Doe's claim was always a "policy or practice" claim, never an "individual release" claim. His First Amended Complaint, which added the § 1983 claim, alleged, *inter alia*, that "The disclosure to OSPI of the personally identifiable information concerning John Doe was pursuant to Gonzaga University's practice or policy that disclosure under such circumstances was and is appropriate." (First Amended Complaint, ¶ 2.51, p. 12, CP 1792.) The jury instructions appropriately set forth the requirement that Doe prove a policy or practice. (CP 1497.)

As acknowledged by the Washington Supreme Court, the jury was presented evidence that OSPI was "routinely called" by Gonzaga representatives to talk about student applications presenting cause for concern and was "often provided" with the names of the student candidates. The Court concluded that "substantial evidence supports a determination that Gonzaga had a 'policy or practice' of disclosing personally identifiable information contained in education records — in violation of FERPA." (Petitioner's App. 19a [reproduced *supra*].)

Only two lower court decisions, both arising out of the same federal district, hold that even a policy or practice of FERPA violations can not be a predicate to a claim for damages under § 1983. *Norris v. Board of Educ. of*

Greenwood Community School Corp., 797 F. Supp. 1452 (S.D. Ind. 1992) summarily dismissed the plaintiff's § 1983 claim, asserting, without illustration or explanation, that FERPA gives enforcement power to the Secretary of Education and "provides an exclusive enforcement mechanism." 797 F. Supp. at 1465. *But see Blessing v. Freestone*, 520 U.S. 329, 346-347, 117 S. Ct. 1353, 1362, 137 L. Ed. 2d 569, 586 (1997) (observing that absent a federal statute's expressly curtailing § 1983 actions, a defendant must make the "difficult showing that allowing § 1983 actions to go forward in these circumstances 'would be inconsistent with Congress' carefully tailored scheme;'" and observing that the Court has only found such Congressional intent where the statute created its own statutory or administrative remedies addressing the same harms.) The Indiana appellate decision in *Meury v. Eagle-Union Community Sch. Corp.*, 714 N.E.2d 233 (Ind. App. 1999) relied on *Norris*, 714 N.E.2d at 239 (although pointing out as an additional basis for rejecting the claim that the Mourns had failed to allege any "policy or practice" of disclosure. *Id.*)

The case law does not therefore present a conflict of the sort that warrants the Court's review.

III. THE OVERWHELMING MAJORITY OF FEDERAL COURTS HAVE CORRECTLY DECIDED THE ISSUE OF WHETHER FERPA CREATES RIGHTS IN STUDENTS AND THEIR PARENTS UNDER ALL OF THE COURT'S PRECEDENTS, INCLUDING *SUTER v. ARTIST M.* AND *BLESSING v. FREESTONE*.

The Greek root of the word "heresy" connotes picking and choosing from settled doctrine to selectively emphasize what one finds appealing at the expense of what one finds

disagreeable. With this sense of the word in mind, Gonzaga's interpretation of federal rights enforceable under 42 U.S.C. § 1983 should be anathema. In particular, Gonzaga isolates language from *Suter v. Artist M.*, 503 U.S. 347 (1992), and one detail from *Blessing v. Freestone*, 520 U.S. 329 (1997), at the expense of settled doctrine expressed in *Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418 (1987), and *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), and subsequently approved in *Blessing*.

The Washington Supreme Court correctly determined that FERPA creates enforceable federal rights using the proper test. The test, summarized in *Blessing* and derived from *Wright* and *Wilder*, has three parts:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.

520 U.S. at 340-341 (citations omitted). Gonzaga cites this test in a parenthetical comment as an afterthought. (Pet. for Cert., p. 11.)

Instead, Gonzaga focuses on *Suter*. The only principle that it culls from the case is the requirement that federal rights derived from Congress' spending power must be "unambiguous." (Pet. for Cert., p. 9.) Applying this principle, Gonzaga argues that FERPA rights are unenforceable under § 1983 because "nothing in the statute" gives "notice that

individual alleged instances of unconsented disclosure of education records would subject them to private damages actions by students and parents." (Pet. for Cert., p. 10.)

Gonzaga overstates the principle that it draws from *Suter*. Initially, Gonzaga wrongly implies that it is the availability of "private damage actions" that must be "unambiguous," rather than the federal rights underlying the private damages actions. Nothing in *Suter* suggests that the focus should be on the availability of private damages actions. To the contrary, *Suter* confirms that the proper focus is whether the statutory language creates "enforceable rights, privileges, or immunities" within the meaning of § 1983. 503 U.S. at 357 (quoting *Wright*).

To read *Suter* as requiring unambiguous congressional intent to create private damages actions (rather to create enforceable federal rights) is actually contrary to *Blessing*, *Wilder*, and *Wright*. Once it is determined that a statute creates enforceable federal rights, a remedy under § 1983 is presumed. *Blessing*, 520 U.S. at 341; *Wilder*, 496 U.S. at 520-521. This Court "do[es] not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." *Wright*, 479 U.S. at 423-424 (quotation omitted). In other words, the existence of § 1983 is itself unambiguous congressional intent to create private damages actions to remedy violations of other federal rights. Requiring additional intent serves only to undermine this already unambiguous expression of congressional intent.

Furthermore, Gonzaga wrongly treats *Suter* as if the reference to "unambiguous" intent superimposes another requirement on the three-part test. If there was any doubt

about this after *Suter* was decided, it was dispelled in *Blessing*. The fact that most of the cases cited by Gonzaga pre-date *Blessing* implicitly confirms this. In *Blessing*, the Court recapitulated the settled doctrine of *Wright* and *Wilder* without any additional gloss from *Suter*. 520 U.S. at 340-341.

Gonzaga is similarly selective in its reading of *Blessing* as in its reading of *Suter*. The only principle that it culls from *Blessing* is that federal rights do not exist in the absence of an "enforcement mechanism to command . . . [a] particular action." (Pet. for Cert., p. 10.) Applying this principle, Gonzaga argues that FERPA rights are unenforceable because the statute "contains no mechanism for sanction of individual disclosures of student information. The Secretary of Education cannot command . . . any particular action[.]" (Pet. for Cert., p. 11.) As with *Suter*, Gonzaga misreads *Blessing*.

In *Blessing*, the Court cited the lack of any enforcement mechanism merely as evidence that Title IV-D, a child support enforcement program, is not intended to benefit individual children and custodial parents, which is the first element of the test quoted above. 520 U.S. at 343-344. The Court did not elevate the existence of an enforcement mechanism into additional element of the test that must be satisfied.

In any event, Gonzaga is flat wrong when it asserts that "[t]he Secretary of Education cannot command . . . any particular action under FERPA but is authorized only to terminate federal funding." (Pet. for Cert., p. 11.) To the contrary, FERPA states that "[t]he Secretary shall take appropriate actions to enforce this section and to deal with violations of this section[.]" § 1232g(f). "Appropriate actions" include withholding of payments under any

applicable program, cease-and-desist orders, and complete termination of funding. 34 C.F.R. § 99.67(a)(1)-(3). In this sense, even if its reading of *Blessing* were correct, the principle Gonzaga derives from the case is inapplicable to FERPA.

In applying *Suter* and *Blessing*, Gonzaga misrepresents the nature of John Doe's claims. Gonzaga describes those claims as arising from "individual alleged instances of unconsented disclosure," and "for particular instances of disclosure." (Pet. for Cert., pp. 10-11.) Yet, as discussed above, there can be no question that John Doe's claims against Gonzaga were based on a "policy or practice" of disclosing student information in violation of FERPA. Viewing John Doe's FERPA claims in the proper light, it is evident that his rights are enforceable under § 1983.

To determine whether a statute creates enforceable federal rights, it is necessary to "analyze the statutory provisions in detail, in light of the entire legislative enactment." *Suter*, 503 U.S. at 357 (discussing *Wright* and *Wilder*). FERPA provides that no funds shall be made available to any educational agency or institution which has a policy or practice of permitting the release of education records or personally identifiable information contained therein without parental consent. § 1232g(b)(1), (2)(A). It provides that "whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent of *and the rights accorded to the parents of the student* shall thereafter only be required of and accorded to the student." § 1232g(d) (italics added). It further provides that no funds shall be made available to any educational agency or institution "unless such agency or institution effectively informs the parents of the

students, or the students . . . *of the rights accorded them by this section*." § 1232g(e) (italics added). The Secretary of Education is authorized to adopt "regulations or procedures . . . *which protect the rights of privacy of students*[.]" § 1232g(c) (italics added). Records of all disclosures must be maintained and made available for inspection by parents or students. § 1232g(4)(A). Even otherwise validly-disclosed educational records or other personally identifiable student information must be destroyed when they are "no longer needed." § 1232g(b)(1)(B), (F); *accord* § 1232g(b)(3), (5). These provisions bind not only educational agencies and institutions, but also the individuals or entities to whom they disclose educational records or other personally identifiable student information. § 1232g(4)(B).

FERPA regulations confirm that the statute creates enforceable federal rights. While these regulations do not necessarily create any additional rights not contained in the text of the statute, they illustrate the nature of the rights created in the statute, and it is appropriate to consider the regulations for this purpose. For example, in *Wilder*, holding that the Boren Amendment created federal rights to "reasonable" reimbursement for services enforceable by health care providers, this Court relied on regulations setting forth the factors determining reasonableness. 496 U.S. at 519 & n.17. Similarly, in *Wright*, holding that the Brooke Amendment created federal rights to a reasonable amount for the use of utilities enforceable by public housing tenants, this Court relied on regulations defining "rent" to include such utilities. 479 U.S. at 430. This Court also considered regulations in *Suter*, 503 U.S. at 363, and *Blessing*, 520 U.S. at 343-344, even though the statutes at issue in those cases were ultimately held not to create enforceable federal rights.

FERPA regulations contain sections addressed specifically to the rights of parents and students. 34 C.F.R. §§ 99.4, 99.5. They emphasize that "[t]he parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records," and they identify what the written consent must contain. *Id.* § 99.30(a), (b). They require records of all disclosures for review by students and their parents. *Id.* § 99.32. They place limitations on redisclosure or use of educational records or other personally identifiable information of a student by individuals or entities receiving them from an educational agency or institution. *Id.* § 99.33.

If the foregoing provisions of FERPA do not create enforceable federal rights, then no statute enacted under Congress' spending power could ever create enforceable federal rights. FERPA's focus on student privacy satisfies the first element of the proper test. As quoted above, the first element of the test requires that "Congress must have intended that the provision in question benefit the plaintiff." *Blessing*, 520 U.S. at 340-341. For example, in *Wright*, the Court held that the Brooke Amendment limiting rent charged by public housing authorities was "undeniabl[y]" intended to benefit the tenants. 479 U.S. at 430. Likewise, in *Wilder*, the Court held that the Boren Amendment requiring "reasonable" reimbursements for health care providers leaves "little doubt" that such providers are intended beneficiaries. 496 U.S. at 510. In a similar fashion, it cannot seriously be disputed that the myriad FERPA provisions guaranteeing privacy of educational records and other personal information and requiring consent for disclosure of such information, is intended to benefit students. There is no corresponding benefit to the educational agencies and institutions subject

to FERPA. In fact, the requirements of the Act undoubtedly create an administrative burden that they accept in exchange for federal funds.

The absolute nature of the privacy and consent rights afforded by FERPA satisfies the second element of the test. As quoted above, the second element of the test requires "that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-341. For example, in *Wright*, the Court held that the right of public housing tenants to have "reasonable" amounts for utilities included within rent limits was not so vague and amorphous as to defeat enforcement. 479 U.S. at 430. Likewise, in *Wright*, the Court held the right of health care providers to receive "reasonable" reimbursements was sufficiently definite to be enforceable. By comparison, FERPA's absolute consent and privacy rights are far less vague and amorphous, and correspondingly easier to enforce.

The mandatory link between FERPA rights and funding satisfies the third element of the test. As quoted above, the third element of the test requires that "the statute must unambiguously impose a binding obligation on the States." *Blessing*, 520 U.S. at 340-341. The Court explained this element of the test in *Blessing* by stating "[i]n other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms." 520 U.S. at 341 (citing *Wilder*). For example, in *Wilder*, the Court held that the Boren Amendment imposed a binding obligation because "provision of federal funds is expressly conditioned on compliance with the amendment and the Secretary is authorized to withhold funds for noncompliance[.]" 496 U.S. at 512 (citation omitted). This type of binding obligation

is indistinguishable from that imposed by FERPA. § 1232g(b)(1), (2). Since all of the elements of the proper test are satisfied, the Washington Supreme Court correctly determined that John Doe has enforceable rights under FERPA.

CONCLUSION

Based on the foregoing, John Doe respectfully asks the Court to deny the petition.

Respectfully submitted,

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Submitted this 19th day of December 2001.

APPENDIX

APPENDIX

APPENDIX — RELEVANT STATUTES AND REGULATIONS

The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA), provides in pertinent part:

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization, other than to the following –

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required . . . .

(B) (i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives

of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3) . . . .

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted . . . .

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of release, or providing access to, any personally identifiable information in education records . . . unless –

(A) there is a written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents . . . .

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: Provided, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to

persons or organizations authorized in, and under conditions of, (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(c) **Surveys or data-gathering activities; regulations** Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data . . . .

(d) **Students' rather than parents' permission or consent** For purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) **Informing parents or students of rights under this section** No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

Appendix

(f) Enforcement; termination of assistance The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

Appendix

Regulations adopted by the Secretary of the Department of Education pursuant to FERPA, 34 C.F.R. pt. 99, provide in pertinent part:

§ 99.2 What is the purpose of these regulations? The purpose of this part is to set out requirements for the protection of privacy of parents and students under [FERPA].

§ 99.4 What are the rights of parents? An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes those rights.

§ 99.5 What are the rights of students? (a) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student. (b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

Appendix

§ 99.67 How does the Secretary enforce decisions?
(a) If the educational agency or institution does not comply . . . the Secretary may . . . (1) Withhold further payments under any applicable program; (2) Issue a compliant to compel compliance through a cease-and-desist order; or (3) Terminate eligibility to receive funding under any applicable program.

Supreme Court, U.S.
FILED
DEC 26 2001
CLERK

(3)
No. 01-679

IN THE
Supreme Court of the United States

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
Petitioners,

v.

JOHN DOE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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	Page
CASES:	
Arkansas Med. Soc'y, Inc. v. *Reynolds,* 6 F.3d 519 (8th Cir. 1993)	7
Blessing v. *Freestone*, 520 U.S. 329 (1997)	*passim*
Cort v. *Ash*, 422 U.S. 66 (1975)	3
Evergreen Presbyterian Ministries Inc. v. *Hood,* 235 F.3d 908 (5th Cir. 2000)	7
Falvo v. *Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203 (10th Cir. 2000), *cert. granted*, 121 S. Ct. 2547 (2001)	5, 7
Fay v. *South Colonie Cent. Sch. Dist.*, 802 F.2d 21 (2d Cir. 1986)	5
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Norris by Norris v. *Board of Educ. of Greenwood Cmty. Sch. Corp.*, 797 F. Supp. 1452 (S.D. Ind. 1992)	2
Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981)	6
Sellers by Sellers v. *School Bd. of Manassas, Va.*, 141 F.3d 524 (4th Cir.), *cert. denied*, 525 U.S. 871 (1998)	6

TABLE OF AUTHORITIES—Continued

	Page
CASES:	
Smith v. *Duquesne Univ.*, 612 F. Supp. 72 (W.D. Pa. 1985), *aff'd without op.*, 787 F.2d 583 (3d Cir. 1986)	4
Stowell v. *Ives*, 976 F.2d 65 (1st Cir. 1992)	7
Suter v. *Artist M.*, 503 U.S. 347 (1992)	*passim*
Wilder v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990)	4, 5, 6, 7
STATUTES:	
Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g	*passim*
42 U.S.C. § 671(a)(10) (1992)	4
42 U.S.C. § 671(a)(17) (1992)	4
42 U.S.C. § 672(f) (1992)	4
42 U.S.C. § 1983	*passim*

IN THE

Supreme Court of the United States

No. 01-679

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
Petitioners,

v.

JOHN DOE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

REPLY BRIEF FOR PETITIONERS

Respondent's Brief in Opposition does not deny that there is a split among federal and state courts over whether FERPA confers rights that may be enforced in a § 1983 action. Nor does Respondent seriously dispute that the Washington Supreme Court failed to analyze that question using the approach set forth in *Suter* v. *Artist M.*, 503 U.S. 347 (1992), and *Blessing* v. *Freestone*, 520 U.S. 329 (1997). Those cases require that a statute "unambiguously" express Congress' intent to create individual rights enforceable by § 1983 before a court may allow such an action to proceed. Instead, Respondent apparently seeks to obscure those points by reversing the order of the issues presented in the petition and arguing facts of the case not relied on by the Washington Supreme Court. None of Respondent's arguments refutes the

central point of the petition – that the Washington Supreme Court's unprecedented ruling permitting a § 1983 action to enforce FERPA against a private university conflicts with *Suter* and *Blessing* and with the holdings of other federal and state courts.

1. Respondent's only serious attempt to address the clear split in authority identified in the petition, *see* Pet. at 14-16, is to argue that *Gundlach* v. *Reinstein*, 924 F. Supp. 684 (E.D. Pa. 1996), *aff'd without op.*, 114 F.3d 1172 (3d Cir. 1997), is not at odds with the holding below because the plaintiff there did not allege a "policy or practice" of education record disclosure. Opp. at 17. First, even if Respondent were right about this, there is no doubt that the holdings of other courts squarely conflict with the Washington Supreme Court ruling in this case. Those courts directly held that FERPA may not be enforced by § 1983 actions. *See Norris by Norris* v. *Board of Educ. of Greenwood Cmty. Sch. Corp.*, 797 F. Supp. 1452, 1465 (S.D. Ind. 1992) (FERPA is "insufficient to support a § 1983 action for damages"); *Meury* v. *Eagle-Union Cmty. Sch. Corp.*, 714 N.E.2d 233, 239 (Ind. Ct. App. 1999) (plaintiffs "failed to state a private cause of action by invoking § 1983 to remedy an alleged FERPA violation"); *Joseph M. ex rel. Kimberly F.* v. *Southeast Delco Sch. Dist.*, 2001 WL 283154, at *9, *10 (E.D. Pa. Mar. 19, 2001) (denying request for relief under § 1983 to enforce FERPA, citing *Gundlach* and *Suter*).[1] It is thus simply beyond dispute that "there is a split of authority over whether FERPA can form the basis of a claim under section 1983." *Goodreau* v. *Rector & Visitors of Univ. of Va.*, 116 F. Supp. 2d 694, 707 (W.D. Va. 2000).

[1] Respondent is incorrect that *Joseph M.* creates no conflict. *See* Opp. at 17. There, "plaintiffs ask[ed] th[e] Court to allow for recovery under section 1983 *and* impose sanctions." *Joseph M.*, 2001 WL 283154, at *10 (emphasis added). The court's denial of the requested relief, citing cases "denying section 1983 claims under FERPA," *id.*, cannot be reconciled with the holding below in this case.

But further, Respondent is wrong that *Gundlach* is somehow consistent with the Washington Supreme Court's holding here. As an initial matter, contrary to Respondent's contention, the court in *Gundlach* did not hold any violation of FERPA to be privately "actionable." To the contrary, the court refused to permit a § 1983 action to enforce FERPA and held that the cases cited by the plaintiff there (and by Respondent here) permitting such claims were "at odds with what appears to be the prevailing post-*Suter* view in this circuit." *Gundlach*, 924 F. Supp. at 692. That view, the court held, is that "absent satisfaction of the *Cort* v. *Ash* [, 422 U.S. 66, 78 (1975),] test, a plaintiff cannot seek to enforce a federal spending-power based statute by way of a § 1983 action." *Id.* The Third Circuit summarily affirmed the district court judgment. 114 F.3d 1172 (3d Cir. 1997). Notwithstanding Respondent's attempt to downplay the conflict, *Gundlach* is thus squarely at odds with the Washington Supreme Court's holding that plaintiffs may use § 1983 actions to enforce FERPA.

Respondent's argument – that there is no conflict, because plaintiffs in *Gundlach* did not allege a "policy or practice," whereas Respondent asserts that he did, *see* Opp. at 17 – confuses the significance of FERPA's "policy or practice" requirement to the issue before the Court. Whether a policy or practice is alleged may affect the merits of a § 1983 claim to enforce FERPA, but before a court ever reaches the merits it must first decide whether FERPA may be enforced under § 1983 in the first place. That is the issue on which the lower courts have split.

In *Suter* and *Blessing*, this Court acknowledged that the plans of state defendants deviated from requirements of federal statutes, yet held that those requirements did not confer individual rights, privileges or immunities enforceable under § 1983. FERPA – which by its terms simply disqualifies from federal funding education institutions that have a policy or practice of releasing education records without

student consent – also does not create individual rights in students, and certainly does not do so "unambiguously."[2] To demonstrate that a statute may be enforced by a § 1983 action, it is not sufficient to plead a general or systemic *violation* of the statute; rather, plaintiff must show that the statute confers an individual right. And "FERPA was adopted to address *systematic, not individual* violations * * *." *Gundlach*, 924 F. Supp. at 692 (quoting *Smith* v. *Duquesne Univ.*, 612 F. Supp. 72, 80 (W.D. Pa. 1985), *aff'd without op.*, 787 F.2d 583 (3d Cir. 1986)) (emphasis in *Gundlach*).

2. The crux of the petition is that under *Suter* and *Blessing* a court must ask whether Congress unambiguously intended to confer a specific individual right to enforce the federal law at issue. Here, Respondent cannot use § 1983 to impose liability on a private university for discussing with state teacher-licensing authorities allegations that a would-be teacher had sexually assaulted a fellow student. Rather than confront our points regarding the Washington Supreme Court's failure to apply the analysis required by *Suter* and *Blessing*, Respondent spins the facts and quibbles with various inconsequential details of our reading of those decisions. Respondent's opposition mirrors the confusion among lower courts over the relationship among *Wilder*, *Suter* and *Blessing*. This Court should grant the petition to clarify this relationship.

First, Respondent contends that under the Court's precedents "it is [not] the availability of 'private damages actions' " but "the federal rights underlying the private damages actions" "that must be 'unambiguous.' " Opp. at 21.

[2] Contrary to Respondent's suggestion, mere reference in FERPA to "rights of privacy" and so forth does not mean that Congress intended to confer on students "a right to enforce the [statute's] requirement" using § 1983 damages actions. *Suter*, 503 U.S. at 357. The *Suter* Court found no such enforcement right despite the presence of "rights" language in the statute at issue there. *See* 42 U.S.C. §§ 671(a)(10), (17), 672(f) (1992).

That is wrong. *Suter* clearly asked whether the statute "unambiguously confer[s]" on plaintiffs "a right *to enforce* the requirement" of the statute. 503 U.S. at 357 (emphasis added). Regardless, Respondent's distinction makes no meaningful difference because the Washington Supreme Court failed to look for, or find, unambiguous Congressional intent in FERPA to confer either individual enforcement rights or any "underlying" federal rights. Instead, the court mechanistically applied the open-ended three-part test of *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498 (1990), without accounting for the more exacting approach this Court's more recent decisions require. *See* Pet. at 11-13.

In particular, the court below never identified precisely what the right was it found enforceable, or where FERPA conferred such a right. Respondent's Opposition does nothing to fill that void. This glaring omission under *Suter* and *Blessing* is a common feature of the decisions which, in conflict with the precedents we have cited, have found FERPA enforceable under § 1983. *See Falvo* v. *Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203, 1211 (10th Cir. 2000) (FERPA "creates an enforceable right within the meaning of § 1983"), *cert. granted*, 121 S. Ct. 2547 (2001); *Fay* v. *South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 35 (2d Cir. 1986) ("FERPA creates an interest that may be vindicated in a section 1983 action"). *Suter* and *Blessing* insist upon a more precise identification of the right allegedly enforceable under § 1983.

Second, while accusing Petitioners of "selective" reading of *Blessing*, it is Respondent who, like the court below, fails to account for the pertinent holdings of that case. Opp. at 22. In *Blessing* the Court emphasized, in refusing to permit a § 1983 action to enforce the statute at issue, that the statute regulated only "*systemwide* performance" rather than "creating an *individual* entitlement." 520 U.S. at 343 (emphasis in original). Further, the Court noted that the statute did not focus on whether "the needs of any particular person have

been satisfied." *Id.* Also significant for the Court in *Blessing* was that the only means of enforcement available to the government under the statute was reduction of federal funding. *Id.* at 344. Although each of these points also applies to FERPA, the Washington Supreme Court, as Respondent seems to concede, never addressed them or the holding in *Suter* because it found lower federal court decisions, including decisions that preceded *Suter* and *Blessing*, "more persuasive" than *Suter* and *Blessing*. Pet. App. 21a.

Respondent addresses only the "enforcement mechanism" point, but it is Respondent who is "flat wrong" in suggesting that FERPA's delegation of enforcement authority to the Secretary of Education creates private judicial enforcement rights. Opp. at 22. Under FERPA, as in *Blessing*, the federal government's authority to compel any action by a private institution such as Gonzaga University rests entirely on the university's acceptance of federal funds. *See Suter*, 503 U.S. at 356 (citing *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). If Gonzaga elected not to comply with FERPA, it could simply withdraw from federal financial assistance. Nowhere in FERPA did Congress suggest that private universities would be subject to additional penalties beyond loss of federal funding. Judicial creation of an additional sanction in the form of a damages action under § 1983 contravenes the Spending Clause agreement between the federal government and the recipient of federal funds. *Cf. Sellers by Sellers* v. *School Bd. of Manassas, Va.*, 141 F.3d 524, 532 (4th Cir.), *cert. denied*, 525 U.S. 871 (1998).

Respondent's argument that *Suter* added no additional requirement to the *Wilder* three-part test, Opp. at 21, and that *Blessing* merely "recapitulated the settled doctrine of *Wright* and *Wilder* without any additional gloss from *Suter*," *id.* at 22, begs a central question Petitioners ask this Court to decide, and underscores the need for this Court's review. Regardless of the dubious merits of Respondent's interpretation, at least three federal courts of appeals disagree. *See*

Evergreen Presbyterian Ministries Inc. v. *Hood*, 235 F.3d 908, 926-927 (5th Cir. 2000) (*Wilder* was "narrowed by the commands of *Suter* and *Blessing* that Congress must unambiguously confer * * * an 'individual entitlement' upon *each* of the plaintiffs") (emphasis in original) (quoting *Blessing*, 520 U.S. at 343-345); *Arkansas Med. Soc'y, Inc.* v. *Reynolds*, 6 F.3d 519, 525 (8th Cir. 1993) (*Suter* added "additional considerations" to the *Wilder* approach); and *Stowell* v. *Ives*, 976 F.2d 65, 68 (1st Cir. 1992) (with decision in *Suter*, "old regime" epitomized by *Wilder* "fell on hard times;" *Suter* "weaken[ed] earlier precedents in certain important respects"); *see also Falvo* v. *Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203, 1211 n.6 (10th Cir. 2000) ("Some courts have concluded that in *Suter* * * * the Supreme Court imposed additional requirements upon [the *Wilder*] analytical framework"), *cert. granted*, 121 S. Ct. 2547 (2001); *Harris* v. *James*, 127 F.3d 993, 1002 (11th Cir. 1997) (noting federal courts of appeals' divergent views on the effect of *Suter* on *Wilder*). Notably, too, Respondent does not argue that the Washington Supreme Court properly applied *Suter*, or properly applied *Blessing* in light of *Suter*, or that application of the *Suter-Blessing* approach would not have changed the judgment below. This case thus squarely presents the Court with an opportunity to resolve a conflict among the Circuits regarding the proper approach in deciding when a federal statute confers § 1983 enforcement rights.

3. Finally, we recommended in the petition that the Court at least hold this case pending decision in *Owasso Independent School District No. I-011* v. *Falvo*, *see* Pet. at 16-17, and Respondent does not dispute that this would be a proper course to follow. Given that the precise question presented here – whether FERPA may be enforced in a § 1983 action – arose in oral argument before this Court in *Falvo*, *see Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, No. 00-1073, Oral Arg. Tr. at 4-10; *id.* at 26-27 (Court questions to Deputy Solicitor General concerning position of the United States on

whether FERPA may be enforced by a § 1983 action), there are now even stronger grounds for at least holding this case pending decision in *Falvo*.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 25 2002
CLERK

No. 01-679

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 5, 2001
CERTIORARI GRANTED JANUARY 11, 2002

8 PP

Relevant Docket Entries from the Supreme Court of Washington 1

Relevant Docket Entries from the Court of Appeals of Washington 3

Relevant Docket Entries from the Superior Court of Washington for Spokane County 5

The appendix to the petition for certiorari contains the following material which is omitted from the Joint Appendix:

A. Opinion of the Supreme Court of Washington (May 31, 2000) 1a

B. Order of the Supreme Court of Washington denying reconsideration (August 10, 2001) 29a

C. Opinion of the Court of Appeals of Washington, Division One (January 31, 2000) 30a

SUPREME COURT OF WASHINGTON

No. 69456-7

JOHN DOE,

Petitioner,

v.

GONZAGA UNIVERSITY, a Washington nonprofit corporation, JULIA M. LYNCH, ROBERTA S. LEAGUE, AND SUSAN J. KYLE,

Respondents.

DOCKET ENTRIES

NO.	DATE	FILINGS – PROCEEDINGS
11	3/20/00	PETITION for Review
15	4/4/00	ANSWER to Petition for Review
16	4/21/00	REPLY to Answer to Petition for Review
27	9/7/00	ORDER Granting Petition for Review
29	10/11/00	Petitioner's Supplemental BRIEF
31	10/12/00	Respondents Supplemental BRIEF

38	12/26/00	Amicus Curiae BRIEF of Association of Washington Business and Washington Association of Independent Colleges and Universities
39	12/26/00	Amicus Curiae BRIEF of the Superintendent of Public Instruction
40	01/03/01	Petitioner's Combined REPLY to Amicus Briefs of Association of Washington Business, Washington Association of Independent Colleges and Universities, and The Office of the Superintendent of Public Instruction
43	5/31/01	OPINION
51	6/20/01	Gonzaga's MOTION for Reconsideration
55	8/10/01	ORDER Denying Gonzaga's Motion for Reconsideration

COURT OF APPEALS OF WASHINGTON
Division I

No. 43437-3-I

JOHN DOE,

Respondent/Cross-Appellant,

v.

GONZAGA UNIVERSITY, a Washington nonprofit Corporation, JULIA M. LYNCH, ROBERTA S. LEAGUE, AND SUSAN J. KYLE,

Appellants-Cross-Respondents.

DOCKET ENTRIES

NO.	DATE	FILINGS – PROCEEDINGS
11	8/3/97	NOTICE of Appeal Case Transferred From Division III 16777-1
17	8/19/97	Amended NOTICE of Appeal with "Order Denying Post-Trial Motions, Denying Cr 26(G) Motion, and Awarding Costs and Attorneys Fees" and "Supplemental Judgment For Attorneys Fees and Costs"
19	9/5/97	NOTICE of Cross Appeal John Doe Cross Appealing
35	3/16/98	Appellant's BRIEF
46	6/2/98	Respondents/Cross Appellants BRIEF

49	8/6/98	Cross Respondents Reply BRIEF
60	10/5/98	Respondents Reply BRIEF
91	11/8/99	OPINION (Withdrawn 1/31/00)
97	11/29/99	Respondent's MOTION for Reconsideration and for Publication
107	1/31/00	ORDER on Motions 1. Granting Extension of Time to File Motion for Reconsideration. 2. Granting Respondent/ Cross-Appellants Motion for Reconsideration and for Publication. 3. Granting Superintendent of Public Instruction's Motion to Order Publication. 4. Withdrawing Opinion Filed 11/8/99. Substituting Amended Opinion
109	1/31/00	OPINION Reversed and Remanded
110	3/1/00	PETITION for Review
115	9/7/00	Petition for Review GRANTED

SUPERIOR COURT OF WASHINGTON
FOR SPOKANE COUNTY

No. 94-2-03120-6

JOHN DOE,

Plaintiff,

v.

JANE DOE, GONZAGA UNIVERSITY,
a Washington non-profit corporation,
SUPERINTENDENT OF PUBLIC INSTRUCTION,
JULIA M. LYNCH, ROBERTA S. LEAGUE,
AND SUSAN J. KYLE,

Defendants.

DOCKET ENTRIES

NO.	DATE	FILINGS – PROCEEDINGS
1	6/17/94	SUMMONS & COMPLAINT
20	10/17/94	ANSWER & COUNTER CLAIM
22	10/19/94	ANSWER
29	1/11/95	ANSWER
33	1/19/95	DEMAND For Jury-12 Person
72	9/25/96	MOTION
74	9/30/96	ORDER Grant Leave to Amend

105	2/21/97	ANSWER & AFFIRMATIVE DEFENSE
111	2/27/97	ANSWER
163	4/2/97	COURT'S INSTRUCTIONS TO JURY
164	4/2/97	VERDICT
170	4/22/97	JUDGMENT
173	5/2/97	MOTION FOR JUDGMENT
184	6/6/97	RESPONSE
187	6/6/97	RESPONSE
189	6/10/97	REPLY
193	7/11/97	NOTICE OF APPEAL to Court of Appeal
195	8/6/97	ORDER Denying Motion/Petition
196	8/6/97	JUDGMENT
197	8/18/97	NOTICE OF APPEAL to Court of Appeal
201	9/3/97	NOTICE OF APPEAL to Court of Appeal
–	12/11/97	VERBATIM REPORT OF PROCEEDINGS

Supreme Court, U.S.
FILED
FEB 25 2002
CLERK

(5)

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110 pp

QUESTION PRESENTED

May a student sue a private university for damages under 42 U.S.C. § 1983 to enforce provisions of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, which disqualify from federal funding educational institutions that have a policy or practice of permitting education records to be released to unauthorized persons?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Gonzaga University and Roberta S. League were defendants in the trial court, appellants and cross-appeal respondents in the Court of Appeals, and respondents in the Washington Supreme Court. Respondent John Doe was the plaintiff in the trial court, respondent and cross-appellant in the Court of Appeals, and petitioner in the Washington Supreme Court. Susan Kyle and Julia Lynch were defendants in the trial court, appellants and cross-appeal respondents in the Court of Appeals, and respondents in the Washington Supreme Court. Judgment was entered against them only with respect to state law claims. Petitioner Gonzaga University is a Washington non-profit corporation with no stock issued. Petitioners are collectively referred to herein as "Gonzaga."

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	3
Statutory and Regulatory Background	3
Facts	5
Proceedings Below	6
SUMMARY OF ARGUMENT	9
ARGUMENT	12
I. CONDITIONS ON FEDERAL FUNDING IN SPENDING CLAUSE LEGISLATION CAN BE ENFORCED UNDER § 1983 ONLY IF CONGRESS UNAMBIGUOUSLY CONFERS ON BENEFICIARIES OF THE CONDITIONS A RIGHT TO ENFORCE THEM.	12

TABLE OF CONTENTS—Continued

Page

A. When Acting Pursuant To The Spending Power, Congress Must Manifest An Unambiguous Intent To Create Individual Rights Enforceable Under § 1983 12

B. Whether A Particular Spending Clause Statute Confers § 1983 Rights Entails Considerations of Federalism, Separation of Powers, And Administrative Deference 18

II. FERPA DOES NOT CONTAIN THE UNAMBIGUOUS EXPRESSION OF CONGRESSIONAL INTENT REQUIRED TO CREATE ENFORCEABLE PRIVATE RIGHTS. 21

A. FERPA's Text And Structure Do Not Create Rights Enforceable Under § 1983 21

B. FERPA's Administrative Enforcement Scheme, Including Provision For Adjudicating Individual Complaints, Confirms That Congress Did Not Intend To Authorize Enforcement Under § 1983 23

C. FERPA's Legislative History Contains No Hint Of An Intent To Allow Private Damages Actions, Or To Establish Radically Different Enforcement Regimes For Public And Private Schools 29

D. Under This Court's Precedents, FERPA Does Not Give Rise To Rights Enforceable Under § 1983 32

III. CONGRESS PRECLUDED ENFORCEMENT UNDER § 1983 BY PROVIDING A COMPREHENSIVE ENFORCEMENT SCHEME INCOMPATIBLE WITH SUCH ACTIONS. 35

TABLE OF CONTENTS—Continued

Page

IV. RESPONDENT IS NOT A PARTY TO THE SPENDING CLAUSE CONTRACT AND ACCORDINGLY HAS NO RIGHT UNDER § 1983 TO SUE ON THE CONTRACT. 39

CONCLUSION 43

STATUTORY AND REGULATORY ADDENDUM

Page

Cases:

Alexander v. *Sandoval*, 532 U.S. 275 (2001)..... 18,19,21,33

Barnhart v. *Sigmon Coal Co.*, No. 00-1307 (U.S. Feb. 19, 2002)..... 23

Belanger v. *Nashua, N.H., Sch. Dist.*, 856 F. Supp. 40 (D.N.H. 1994)..... 32

Blair v. *Union Free Sch. Dist. #6*, 324 N.Y.S.2d 222 (Dist. Ct. 1971)..... 30

Blessing v. *Freestone*, 520 U.S. 329 (1997)..... *passim*

Buckley v. *Fitzsimmons*, 509 U.S. 259 (1993)..... 41

C.N. v. *Ridgewood Bd. of Educ.*, 146 F. Supp. 2d 528 (D.N.J.), *aff'd in part, rev'd in part and remanded*, __F.3d__ (3d Cir. 2001) (Table)..... 28

California v. *Sierra Club*, 451 U.S. 287 (1981)..... 21,33

Cannon v. *University of Chicago*, 441 U.S. 677 (1979)..... 19

Carey v. *Piphus*, 435 U.S. 247 (1978)..... 41

City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981)..... 40,41

Conboy v. *AT&T Corp.*, 241 F.3d 242 (2d Cir. 2001)..... 20

Davis v. *Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)..... 18

Doe v. *Knox County Bd. of Educ.*, 918 F. Supp. 181 (E.D. Ky. 1996)..... 32

Fay v. *South Colonie Cent. Sch. Dist.*, 802 F.2d 21 (2d Cir. 1986)..... 31

Page

Cases:

Frazier v. *Fairhaven Sch. Comm.*, 276 F.3d 52 (1st Cir. 2002)..... 26,27,29,31

Gebser v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)..... 13,17,25

Girardier v. *Webster College*, 563 F.2d 1267 (8th Cir. 1977)..... 32

Golden State Transit Corp. v. *Los Angeles*, 493 U.S. 103 (1989)..... 12

Gravatt v. *Columbia Univ.*, No. 86 C 1308, 1986 WL 11620 (N.D. Ill. Oct. 10, 1986)..... 30

Gravina v. *Brunswick Corp.*, 338 F. Supp. 1 (D.R.I. 1972)..... 30

Hartfield v. *East Grand Rapids Pub. Schs.*, 960 F. Supp. 1259 (W.D. Mich. 1997)..... 32

Jerome B. Grubart, Inc. v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995)..... 41

Kalina v. *Fletcher*, 522 U.S. 118 (1997)..... 41

Klein Indep. Sch. Dist. v. *Mattox*, 830 F.2d 576 (5th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988)..... 32

Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991)..... 19

Maine v. *Thiboutot*, 448 U.S. 1 (1980)..... *passim*

Memphis Cmty. Sch. Dist. v. *Stachura*, 477 U.S. 299 (1986)..... 42

TABLE OF AUTHORITIES—Continued

Page

Cases:

Meury v. *Eagle-Union Cmty. Sch. Corp.*, 714 N.E.2d 233 (Ind. Ct. App. 1999), *transfer denied*, 735 N.E.2d 233 (Ind. 2000) 27

Middlesex County Sewerage Auth. v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) 11,12,36,39

Mitchum v. *Foster*, 407 U.S. 225 (1972) 46

Monroe v. *Pape*, 365 U.S. 167 (1961) 18

Moore v. *Hyche*, 761 F. Supp. 112 (N.D. Ala. 1991) 28

New England Tel. & Tel. Co. v. *Public Utils. Comm'n*, 742 F.2d 1 (1st Cir. 1984), *cert. denied*, 476 U.S. 1174 (1986) 20

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TABLE OF AUTHORITIES—Continued

Page

Cases:

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TABLE OF AUTHORITIES—Continued

Page

Cases:

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Constitution:

U.S. Const. art. I, § 8, cl. 1 12

Statutes:

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Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 40

Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.* 37

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20 U.S.C. § 1232g(a)(1)(A) 4,22

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20 U.S.C. § 1232g(a)(2) 4

20 U.S.C. § 1232g(a)(3) 31

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TABLE OF AUTHORITIES—Continued

Page

Statutes:

20 U.S.C. § 1232g(b)(2) 21

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20 U.S.C. § 1232g(g) ..... *passim*

Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* 36

Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1401 *et seq.* 36

Medicaid Act, 42 U.S.C. § 1396 *et seq.* 38

20 U.S.C. §§ 1234c-f 24

20 U.S.C. § 1234c 2,26

20 U.S.C. § 1234c(a) 10,24,33

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20 U.S.C. §§ 1234c(a)(1)-(3) 24,36

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20 U.S.C. § 1415 (1982) 37

28 U.S.C. § 1257(a) 2

42 U.S.C. § 1983 ..... *passim*

Pub. L. No. 93-568, § 2(a), 88 Stat. 1858 30

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Pub. L. No. 96-88, title III, § 301, title V, § 507, 93 Stat. 677, 692 31

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TABLE OF AUTHORITIES—Continued

Page

Statutes:

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Pub. L. No. 105-244, title IX, §§ 951, 952, 112 Stat. 1835, 1836 31

Pub. L. No. 106-386, Div. B, title VI, § 1601(d), 114 Stat. 1538 31

Pub. L. No. 107-56, title V, § 507, 115 Stat. 367 31

Regulations:

Wash. Admin. Code ch. 180-75 (1997) 2

Wash. Admin. Code 180-75-082(3) (1997) (repealed effective Mar. 8, 1997) 6

Wash. Admin. Code 180-79A-155(3) 6

34 C.F.R. § 99.60 5,25

34 C.F.R. § 99.60-.67 10

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34 C.F.R. §§ 99.63-.66 25

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34 C.F.R. § 99.65 5

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34 C.F.R. § 99.66(b) 25

34 C.F.R. § 99.67 5

34 C.F.R. § 99.67(a) 26

TABLE OF AUTHORITIES—Continued

Page

Legislative Materials:

H. Conf. Rep. No. 93-1619 (1974) 30

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Page

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IN THE

Supreme Court of the United States

No. 01-679

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
Petitioners,

v.

JOHN DOE,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is reported at 24 P.3d 390, and reproduced in the appendix to the petition for certiorari ("Pet. App.") at 1a. The order of the Supreme Court of the State of Washington denying reconsideration is unreported, and reproduced at Pet. App. 29a. The opinion of the Court of Appeals of the State of Washington is reported at 992 P.2d 545, and reproduced at Pet. App. 30a.

JURISDICTION

The judgment of the Washington Supreme Court was entered on May 31, 2001. Pet. App. 1a. On August 10, 2001, the Washington Supreme Court denied Gonzaga's timely

motion for reconsideration. Pet. App. 29a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). The petition for certiorari was filed on November 5, 2001, and granted on January 11, 2002. 122 S. Ct. 865.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 1983 of Title 42 of the United States Code; the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"); 20 U.S.C. § 1234c; the United States Department of Education regulations issued under FERPA, 34 C.F.R. Part 99; and pertinent provisions of Chapter 180-75 of the Washington Administrative Code (1997) are reprinted in the addendum hereto.

INTRODUCTION

Respondent John Doe was awarded compensatory and punitive damages and attorneys' fees for Gonzaga's violations of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g. FERPA, however, contains no express cause of action authorizing such a suit, and courts have uniformly held that no cause of action may be implied under the Act. Doe circumvented this hurdle by alleging state action and suing Gonzaga under 42 U.S.C. § 1983. This Court has held, however, that a § 1983 plaintiff "must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing* v. *Freestone*, 520 U.S. 329, 340 (1997) (emphases in original). FERPA does not confer individual rights enforceable under § 1983, and Doe's claim accordingly should have been dismissed.

Rather than conferring individual rights, FERPA conditions the award of federal funds on recipients not having certain policies or practices. This systemic approach creates no individual entitlement enforceable under § 1983. The remedy for a violation of such funding conditions is a termination of federal financial assistance. Congress authorized the Secretary of Education to invoke that remedy only

after unsuccessful efforts by the Department to obtain voluntary compliance, 20 U.S.C. § 1232g(f), making clear that Congress did not contemplate exposing schools to financial jeopardy without the opportunity for voluntary compliance. Actions for compensatory and punitive damages under § 1983 are inconsistent with that intent. In addition, FERPA goes on to address specifically the question of individual complaints under the Act. It again looks to the Secretary—not private damages actions in court—for enforcement, providing that the Secretary shall establish one centralized office to hear and adjudicate such complaints.

Fundamental considerations of federalism, separation of powers, and administrative deference counsel caution in inferring that Congress intended, though it did not say so, to confer individual rights enforceable under § 1983 when it imposed conditions on recipients of federal funds. Indeed, this Court has held that Congress must "unambiguously" confer such rights before a condition may be enforced under § 1983. *Suter* v. *Artist M.*, 503 U.S. 347, 357, 363 (1992). The text, structure, and legislative history of FERPA contain no hint that Congress supposed that the systemic conditions it imposed on schools accepting federal funds were to be enforced by private parties through individual damages actions in court.

STATEMENT OF THE CASE

Statutory and Regulatory Background. Congress enacted FERPA as part of the Education Amendments of 1974, which reauthorized and amended the Elementary and Secondary Education Act of 1965. FERPA conditions receipt of federal funds by "educational agencies or institutions" on the recipient not having certain policies or practices regarding access to and disclosure of students' education records. First, FERPA regulates *access* to such records, by providing that "[n]o funds shall be made available * * * to any educational agency or institution which has a policy of denying, or which

effectively prevents, * * * parents [or eligible students] * * * the right to inspect and review the education records of their children," 20 U.S.C. § 1232g(a)(1)(A), or fails to provide parents or eligible students an opportunity to challenge the content of such records and to have inaccurate or misleading information corrected or deleted. *Id.* § 1232g(a)(2). Second, FERPA regulates *disclosure* of education records, by providing that "[n]o funds shall be made available * * * to any educational agency or institution which has a policy or practice of permitting the release of education records" without written consent, subject to certain exceptions. *Id.* § 1232g(b)(1).

To enforce these conditions, FERPA requires the Secretary of Education to "take appropriate action to enforce this section and to deal with violations of this section." *Id.* § 1232g(f). Such action may include termination of federal assistance, but only upon a determination that "compliance cannot be secured by voluntary means." *Id.* The Secretary was further required to "establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section." *Id.* § 1232g(g).

FERPA specifies that all the Secretary's functions under the statute, except conducting hearings, must be carried out at headquarters, not in the Department's regional offices. *Id.* That requirement was added "[b]ecause of concern that regionalizing the enforcement of the law may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions * * *." Joint Statement in Explanation of Buckley/Pell Amendment, 120 Cong. Rec. 39,866 (1974).

To carry out his responsibilities under FERPA, the Secretary issued regulations designating the Family Policy Compliance Office ("FPCO") of the Department to "[i]nvestigate, process and review complaints under the Act" and designating the Office of Administrative Law Judges "to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs." 34 C.F.R. § 99.60. The regulations set forth detailed, comprehensive procedures pursuant to which parents and eligible students file complaints with FPCO regarding violations of FERPA, *id.* §§ 99.63, 99.64, and FPCO investigates complaints, *id.* §§ 99.64, 99.65, makes findings and orders compliance, *id.* § 99.66, and enforces its decisions, *id.* § 99.67.

Facts. This § 1983 case arises out of a teacher-in-training's claim that Gonzaga (a private Jesuit university located in Spokane, Washington) violated his rights under FERPA because members of its faculty discussed with a state investigator another student's accusation that he sexually assaulted her. As the Washington Supreme Court acknowledged, in 1993 petitioner Roberta League, the certification specialist at Gonzaga's school of education, and Dr. Susan Kyle, director of field experience for student teachers at Gonzaga, heard reports from student Julia Lynch that respondent John Doe[1]—a school of education student—sexually assaulted fellow student Jane Doe. Pet. App. 2a-3a. When Kyle approached her, Jane Doe refused to make a formal statement about the allegations and would not comment on her relationship with John Doe, stating, according to Kyle, "I promised [John Doe] I wouldn't tell. He made me promise." Pet. App. 5a, 33a.

Washington State Board of Education regulations then in effect governed the teacher certification process. They required that a designated official of an applicant's school

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[1] Although respondent's identity was made public during proceedings below, we follow the Washington Supreme Court in referring to him as John Doe and to the student he allegedly assaulted as Jane Doe. *See* Pet. App. 2a.

consult faculty members who knew the applicant, and swear that the school official and consulted faculty members had "no knowledge that the applicant has been convicted of any crime and ha[d] no knowledge that the applicant has a history of any serious behavioral problems." Wash. Admin. Code 180-75-082(3) (1997) (repealed effective Mar. 8, 1997).[2]

Concerned about whether Gonzaga would be able to submit an affidavit supporting John Doe's application for teacher certification, League discussed the matter with Adelle Nore, a senior investigator with the Office of the Superintendent of Public Instruction (OSPI), the state agency that regulates teacher education programs in Washington. Other Gonzaga personnel also contacted Nore concerning the allegations against John Doe. During one contact, League gave Nore John Doe's name.

Respondent's state law claims were based on Gonzaga's internal documentation of the sexual misconduct allegations, and on the facts reported to OSPI. His FERPA claim is premised on disclosure to OSPI of his name and the reported allegations.

Pursuant to the pertinent state board of education regulation, the Gonzaga school of education dean, Dr. Corinne McGuigan, eventually concluded that sufficient evidence of a serious behavior problem precluded her from signing the affidavit in support of John Doe's application for teacher certification. Gonzaga never provided OSPI an affidavit regarding John Doe.

Proceedings Below. John Doe sued Jane Doe for defamation and Gonzaga for defamation, negligence, and breach of

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[2] The provision that replaced section 180-75-082 of the Washington Administrative Code similarly requires a teacher certification applicant's school of education to submit an affidavit attesting to "the applicant's character or fitness." Wash. Admin. Code 180-79A-155(3).

educational contract. John Doe later added the other individual defendants as well as a state law claim for invasion of privacy and a § 1983 claim that alleged violation of FERPA arising out of the release of his name to OSPI.

At trial, Gonzaga moved for judgment as a matter of law on the FERPA claim. Gonzaga argued that FERPA creates no right or privilege under § 1983 and that Gonzaga's challenged conduct was not in any event under color of state law. The trial court denied the motion.

A jury returned a verdict for John Doe on all five theories of recovery and awarded him a total of $1,155,000 in damages. On the FERPA claim, the jury awarded $150,000 in compensatory and $300,000 in punitive damages against Gonzaga and League. The trial court entered judgment on the verdict and awarded John Doe attorneys' fees and costs pursuant to his § 1983 claim. Superior Ct. Dkt. No. 164 at 3-4, 170 at 2, 4.

Gonzaga appealed the denial of its motions and the judgment. On appeal Gonzaga argued, among other things, that FERPA may not be enforced under § 1983 and that its challenged conduct was not under color of state law.

The Washington Court of Appeals reversed the judgment on all five of John Doe's claims, including the FERPA claim. Pet. App. 53a. The Court of Appeals held that "FERPA does not create individual rights privately enforceable under 42 U.S.C. § 1983." Pet. App. 47a. FERPA, the court noted, provides that federal funds be unavailable to an education institution that "has a policy or practice of permitting the release of education records" without consent. *Id.* (quoting 20 U.S.C. § 1232g(b)). "Like the federal law at issue in [*Blessing* v. *Freestone*]," the court concluded, FERPA requires that schools "have in place a *systemwide* plan; the law is not intended to ensure that 'the needs of any particular person have been satisfied.' " *Id.* (quoting *Blessing*, 520 U.S. at 343).

The Washington Supreme Court granted John Doe's petition for review. That court addressed the question "[w]hether FERPA creates any right or privilege which can be enforced by individuals under 42 U.S.C. sec. 1983." Pet. App. 11a. Gonzaga contended that this Court's decision in *Suter* v. *Artist M.* made clear that the overriding question in deciding whether a Spending Clause statute creates rights enforceable under § 1983 is whether the statutory language "unambiguously confer[s] an enforceable right upon the Act's beneficiaries * * *." 503 U.S. at 363; *see id.* at 357 (same). The Washington Supreme Court, however, failed to apply the *Suter* analysis; indeed, the court's only citation to *Suter* came in a footnote that implicitly criticized the Washington Court of Appeals for relying on that decision. Pet. App. 20a n.11.

Purporting to analyze the § 1983 enforceability question under the "three-factor test" this Court applied in *Blessing*, the Washington Supreme Court asked "(1) whether Congress intended the provision in question to benefit the plaintiff; (2) whether the right protected by the statute is so 'vague and amorphous' that its enforcement would strain judicial competence; and (3) whether the statute imposes a binding obligation on the states." Pet. App. 19a-20a. The court found that FERPA "is intended to benefit students"; that "the right is not so 'vague and amorphous' that the court cannot enforce it"; and that "the FERPA provision provides a binding obligation." Pet. App. 20a. Although the court acknowledged that "FERPA itself does not give rise to a private cause of action," Pet. App. 19a, it nonetheless held that "the FERPA provision at issue here gives rise to a federal right enforceable under section 1983." Pet. App. 20a.

The court reversed the Court of Appeals and remanded with instructions to reinstate the judgment on all of John Doe's claims—including compensatory and punitive damages and attorneys' fees on the FERPA claim—except the negligence claim, which, it held, should be dismissed. Pet. App. 28a. Gonzaga's timely motion for reconsideration was

denied. Pet. App. 29a.[3] Gonzaga petitioned for certiorari, raising two questions: (1) whether a student may sue a private university for damages under § 1983 to enforce FERPA, and (2) whether a private university acts "under color of state law" when it provides information to a state official in connection with state law requirements. This Court granted certiorari, limited to the first question. 122 S. Ct. 865.

SUMMARY OF ARGUMENT

Congress provided no express cause of action in FERPA, and courts have consistently held that there is no implied right of action under the Act. The question presented is whether Congress nonetheless "unambiguously" expressed the intent in FERPA to confer individual rights enforceable in private damages actions under 42 U.S.C. § 1983. *Suter*, 503 U.S. at 357, 363. That rigorous standard, which must be met before conditions in Spending Clause legislation will be held to give rise to § 1983 rights, reflects the profound federalism, separation of powers, and administrative deference principles implicated by a judicial decision to find such a cause of action when Congress has not legislated one expressly, but has instead—as in FERPA—provided a different remedial regime, one that vests remedial authority in an expert agency rather than federal courts.

FERPA does not confer rights enforceable under § 1983. Respondent Doe relies upon FERPA's disclosure provisions, but those provisions are not phrased in terms of individual rights. They instead condition the receipt of federal funds on schools not having certain policies or practices. *See* 20 U.S.C. § 1232g(b). Congress sought to achieve its goals in FERPA not by empowering parents and students to sue for

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[3] The Washington Supreme Court stayed the judgment on the FERPA claim pending the petition for certiorari and subsequent proceedings in this Court. Petitioners have satisfied the judgment with respect to the non-FERPA claims.

damages, but by requiring funding recipients to act in a certain manner.

This conclusion is confirmed by the remedies Congress chose to provide in FERPA. Congress gave the Secretary of Education the responsibility to "take appropriate actions to enforce [FERPA] and to deal with violations of [FERPA]," and gave him the authority to do so by withholding funds, issuing cease and desist orders, entering into compliance agreements, and taking "any other action authorized by law." 20 U.S.C. §§ 1232g(f), 1234c(a). Funds may be terminated, however, only if the Government's efforts to achieve voluntary compliance are fruitless and the failure to comply is substantial. *Id.* §§ 1232g(f), 1234c(a).

In addition, Congress in FERPA went on to address specifically the issue of individual complaints, again looking to the Secretary to supervise the remedy. FERPA directs that "[t]he Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating * * * complaints which may be filed concerning alleged violations of [FERPA]." *Id.* § 1232g(g). Congress also specified that, "[e]xcept for the conduct of hearings, none of the functions of the Secretary under [FERPA] shall be carried out in any of the regional offices of [the] Department." *Id.* The Secretary has carried out his responsibilities under the statute by establishing the Family Policy Compliance Office and a detailed complaint adjudication procedure. *See* 34 C.F.R. §§ 99.60-.67. Congress' intent to vest and centralize remedial authority under FERPA in the Secretary, to avoid "multiple interpretations" of FERPA, 120 Cong. Rec. 39,866 (1974), would be wholly undermined by allowing individual damages actions under § 1983.

The remedial scheme Congress crafted in FERPA not only reflects the absence of any unexpressed intent to confer individual rights enforceable under § 1983, it is also "sufficiently comprehensive" to evince an intent to foreclose that remedy. *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981). Congress' decision to centralize remedial authority in the Secretary "is incompatible with individual enforcement under § 1983." *Blessing*, 520 U.S. at 341. The fact that Congress expressly addressed the question of individual complaints of violations under the Act, and provided a system for considering and "adjudicating" such complaints, 20 U.S.C. § 1232g(g), readily distinguishes this case from those in which the Court has found the provided remedies not "sufficiently comprehensive" to preclude resort to § 1983.

Quite apart from the foregoing, FERPA does not confer individual rights enforceable under § 1983 because parents and students are at most third-party beneficiaries of the Spending Clause contract between schools and the Federal Government, and third-party beneficiaries enjoyed no right to enforce a contract in 1871, when § 1983 was enacted. This Court regularly construes the scope of § 1983 in accord with the common law rules in effect when it was enacted. Given the rule that third-party beneficiaries had no right to sue on the contract, the Congress that passed § 1983 would not have thought it was conferring the right to sue on the beneficiaries of conditions in legislation enacted pursuant to the spending power.

ARGUMENT

I. CONDITIONS ON FEDERAL FUNDING IN SPENDING CLAUSE LEGISLATION CAN BE ENFORCED UNDER § 1983 ONLY IF CONGRESS UNAMBIGUOUSLY CONFERS ON BENEFICIARIES OF THE CONDITIONS A RIGHT TO ENFORCE THEM.

A. When Acting Pursuant To The Spending Power, Congress Must Manifest An Unambiguous Intent To Create Individual Rights Enforceable Under § 1983.

1. Section 1983 authorizes private actions against state officials for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. In *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), this Court held that § 1983 actions may be brought against States to enforce rights created by federal statute as well as by the Constitution. *Id.* at 4. Not every violation of a federal statute, however, contravenes § 1983—"a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing*, 520 U.S. at 340 (emphases in original) (citing *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 106 (1989)). Thus, in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), this Court "recognized two exceptions to the application of § 1983 to statutory violations." *Sea Clammers*, 453 U.S. at 19 (citing *Pennhurst*). A § 1983 action will not lie where (1) the statute does not create "enforceable rights" under § 1983, or (2) the statute itself provides an enforcement scheme "incompatible with individual enforcement under § 1983." *Blessing*, 520 U.S. at 341. *See Sea Clammers*, 453 U.S. at 19; *Pennhurst*, 451 U.S. at 28.

Determining whether a federal statute creates rights enforceable under § 1983 requires taking "pains to analyze the statutory provisions in detail, in light of the entire legislative enactment." *Suter*, 503 U.S. at 357. A key feature of the

statute at issue in this case—FERPA—is that it is spending power legislation. *See* U.S. Const. art. I, § 8, cl. 1. Such legislation "is much in the nature of a contract:" in exchange for federal funding, recipients agree to comply with federally-imposed conditions. *Pennhurst*, 451 U.S. at 17. This "contractual nature has implications for our construction of the scope of available remedies." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). As the Court explained in *Suter*:

> The legitimacy of Congress' power to legislate under the spending power * * * rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. [503 U.S. at 356 (quoting *Pennhurst*, 451 U.S. at 17).]

Whether a Spending Clause statute is enforceable under § 1983 thus turns on whether Congress "unambiguously confer[red] upon the * * * beneficiaries of the Act a right to enforce the requirement" at issue. *Suter*, 503 U.S. at 357. *See also Gebser*, 524 U.S. at 287 ("When Congress attaches conditions to the award of federal funds * * *, we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition. * * * Our central concern * * * is with ensuring that 'the receiving entity of federal funds [has] notice that it will be liable for a monetary award.' ") (citation omitted).

This painstaking analysis "in detail," this "close" examination for "unambiguous" intent, is directed not to whether the statute at issue "created unspecified 'rights,' " but rather to the more exacting inquiry into whether the statute confers a "protected individual interest," "an *individual* entitlement." *Blessing*, 520 U.S. at 343 (emphasis in original). To aid that

inquiry, the Court has "traditionally looked at three factors" in considering whether a federal statute confers individual rights enforceable under § 1983: whether the provision in question was intended to benefit the putative plaintiff, whether the interest the plaintiff asserts is so "vague and amorphous" that "its enforcement would strain judicial competence," and whether the statute "unambiguously impose[s] a binding obligation on the States" *Id.* at 340-341. At bottom, the "inquiry focuses on congressional intent," *id.* at 341, and "[t]he most important inquiry * * * is whether Congress intended to create the private remedy sought by the plaintiffs." *Suter*, 503 U.S. at 364. That intent must be expressed "unambiguously" before spending power legislation will be held to give rise to individual rights enforceable under § 1983. *Id.* at 357, 363.

2. This Court's decisions that address whether Spending Clause statutes confer § 1983 rights are characterized by a rigorous examination of whether the requisite unambiguous intent is present. In *Wright* v. *City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), for example, the Court found that public housing tenants had the right to enforce certain rent ceilings with respect to utility charges. As the Court later explained in *Blessing*, "we focused our analysis on a specific statutory provision limiting 'rent' to 30 percent of a tenant's income." 520 U.S. at 342. The Court found "little substance" to the claim that the statute did not confer "specific or definable rights," given that the statutory rent ceiling plainly established "a mandatory limitation focusing on the *individual* family and its income." *Wright*, 479 U.S. at 430 (emphasis added). In addition, "congressional and agency actions indicat[ed] that enforcement authority [was] not centralized and that private actions were anticipated." *Id.* at 424-425.

In *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498, 503 (1990), the Court concluded that Congress created rights enforceable under § 1983 when it required States participating in the Medicaid Program to reimburse health care providers at rates "which the State finds * * * are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities." "[T]he statute and regulations set forth in some detail the factors to be considered" in setting rates, *Suter*, 503 U.S. at 359 (citing *Wilder*, 496 U.S. at 519 n.17), and the statute provided an "objective benchmark" by requiring that rates be sufficient to compensate "efficiently and economically operated facilities" offering "reasonable access to eligible participants." *Wilder*, 496 U.S. at 519. The legislative history supported the Court's conclusion that "Congress * * * understood the Act to grant health care providers enforceable rights." *Id.* at 518. Congress had explained in repealing another provision that it did not intend "in any way [to] contraven[e] or constrain[ ] the rights [of the parties involved] to seek such prospective, injunctive relief in a federal or state judicial forum." *Id.* at 517-518. These factors persuaded the Court that Congress intended to create rights enforceable under § 1983.

In *Suter*, on the other hand, the Court held that Congress did not create § 1983 rights when it required States to have child welfare plans providing for "reasonable efforts" to prevent removal of children from their homes and to facilitate reunification of families. 503 U.S. at 353, 354. The Court concluded that the Act required only that States "have a plan approved by the Secretary which contains the 16 listed features," *id.* at 358, and did not create rights in individuals. The Court found it significant that the Act established its own "enforcement mechanisms," including the authority of the Secretary of Health and Human Services to reduce or eliminate federal funding to a State. *Id.* at 360. The Act also required certain state court findings as a prerequisite to removal of a child from his or her home. As the Court explained, "these statutory provisions * * * show that the absence of a remedy to private plaintiffs under § 1983 does not make the 'reasonable efforts' clause a dead letter." *Id.* at

360-361 (footnote omitted). In light of this statutory text and structure, the Court concluded that the Act did not meet the prerequisite to § 1983 enforceability of "unambiguously confer[ring] upon the * * * beneficiaries of the Act a right to enforce the requirement" at issue. *Id.* at 357.

In *Blessing*, the Court similarly held that a statute setting forth requirements for state child support enforcement programs to which States had to agree in order to receive certain federal funds did not "give individuals a federal right to force a state agency to substantially comply with [the requirements]." 520 U.S. at 333. If a State did not "substantially comply," the Secretary of HHS was authorized to reduce the State's grant. The Secretary interpreted "substantial compliance" as 75, 90, or 100 percent compliance, depending on the requirement. *Id.* at 335. This Court held that "the requirement that a State operate its child support program in 'substantial compliance' with [the federal requirements] was not intended to benefit individual children and custodial parents, and therefore it does not create a federal right." *Id.* at 343. "Far from creating an *individual* entitlement to services," the Court explained, "the standard is simply a yardstick for the Secretary to measure the *system-wide* performance of a State's * * * program." *Id.* (emphases in original). The Court noted that "even when a State is in 'substantial compliance' * * *, any individual plaintiff might still be among the 10 or 25 percent of persons whose needs ultimately go unmet." *Id.* at 344. Because the statute was aimed at "the aggregate services provided by the State," rather than "whether the needs of any particular person have been satisfied," it did not confer individual rights and could not be enforced by § 1983. *Id.* at 343.

This Court also held that the court of appeals had erred in "taking a blanket approach to determining whether [the federal statute] creates rights," and remanded for the district court to determine which particular statutory provisions the plaintiffs alleged conferred rights. *Id.* at 344. Plaintiffs

asserting statutory rights in § 1983 actions must "identify with particularity the rights they claim[ ]," to enable the court to determine whether the statute creates the specific claimed right. *Id.* at 342.

These precedents set forth certain guiding principles. First, as noted, Congress—when it acts pursuant to its spending power—must unambiguously express its intent to confer rights enforceable under § 1983. *Suter*, 503 U.S. at 357, 363. In addition, since an action under § 1983 is brought to enforce individual rights, the underlying statute must confer specific, individual entitlements, not merely impose systemic obligations on funding recipients to act in a certain manner. Thus, the enforceable rent ceiling provision in *Wright* "focus[ed] on the individual family and its income," 479 U.S. at 431, and the reimbursement statute in *Wilder* directed federal funds to health care providers who thus had a specific claim for adequate payment for services rendered. 496 U.S. at 503. *See also Maine* v. *Thiboutot*, *supra* (considering claim that State deprived plaintiffs of welfare benefits by miscalculating amount owed). *Suter* and *Blessing*, in contrast, concerned systemic standards of performance rather than individual entitlements, *see Blessing*, 520 U.S. at 343, and accordingly did not give rise to rights enforceable under § 1983.[4]

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[4] *Cf. Gebser*, 524 U.S. at 287 (according different scope to remedies available under Title VII and Title IX because "whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory *practices* carried out by recipients of federal funds") (emphasis added).

B. Whether A Particular Spending Clause Statute Confers § 1983 Rights Entails Considerations of Federalism, Separation of Powers, And Administrative Deference.

Application of the foregoing principles to the statutory interpretation question of whether Congress intended a spending power statute to give rise to rights enforceable under § 1983 must be informed by an appreciation of the fundamental concerns implicated by such an undertaking. First, conditions on federal funding implicate not only contractual concerns but issues of federalism as well. As Justice Frankfurter noted, the issues raised under § 1983 concern "a basic problem of American federalism" that "has significance approximating constitutional dimension." *Monroe* v. *Pape*, 365 U.S. 167, 222 (1961) (Frankfurter, J., dissenting).

> [T]he Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern * * *. A vital safeguard for the federal balance is the requirement that, when Congress imposes a condition on the States' receipt of federal funds, it "must do so unambiguously." [*Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 654 (1999) (Kennedy, J., dissenting) (quoting *Pennhurst*, 451 U.S. at 17).]

Second, uncertainty as to what rights are conferred by Spending Clause statutes entails profound separation of powers concerns. Whether a federal statute gives rise to rights enforceable in a federal damages action is a quintessential *legislative* judgment. "Like substantive law itself, private rights of action to enforce federal law must be created by Congress." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). To the extent federal courts are loosed from the mooring of unambiguous congressional intent and obliged to

pick and choose which federal requirements may be enforced in judicial actions and which may not—guided only by an indeterminate multi-factor balancing test—they essentially assume a legislative role by supplanting congressional intent with their own. *See id.* at 287 (" 'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.' ") (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment)); *The Federalist* No. 78, at 466 (Alexander Hamilton) (C. Rossiter ed. 1961) (" 'there is no liberty if the power of judging be not separated from the legislative and executive powers' ") (quoting Montesquieu, I *Spirit of Laws* 181). If courts take it upon themselves to decide such questions, they encourage Congress to "shirk its constitutional obligation and leave the issue to the courts to decide." *Cannon* v. *University of Chicago*, 441 U.S. 677, 743 (1979) (Powell, J., dissenting). Important political questions would be resolved without being subjected to the "open debate of the democratic process." *Id.* That debate would certainly have been robust had anyone suggested when FERPA was enacted—years before *Maine* v. *Thiboutot* was decided—that the statute would confer on parents and students a right to bring federal damages actions for a school's contravention of any of the conditions on federal funding Congress imposed.

Third, courts intrude not only on the power of Congress, but on the authority of the Executive branch, when they bring within their purview issues delegated by Congress to administrative agencies. As it did in FERPA, Congress often authorizes an expert agency to elaborate on statutory requirements by promulgating interpretive regulations, providing technical assistance, or developing a common law of agency interpretation through agency resolution of complaints and other agency enforcement actions. *See* 20 U.S.C. § 1232g(g) (centralized Department of Education office for

"adjudicating" FERPA complaints). To infer the availability of federal court actions under § 1983 in such a case would intrude on Congress' intent by shifting the locus of development under the law from the Executive branch to the federal courts.

The ensuing § 1983 actions would involve the federal courts in issues of narrow interest, crowd their dockets, and require them to resolve questions Congress thought better suited to resolution by an agency with technical knowledge and first-hand experience in the regulated area. In addition, such lawsuits would likely produce inconsistent precedents where Congress intended uniformity. *See Conboy* v. *AT&T Corp.*, 241 F.3d 242, 253 (2d Cir. 2001) ("[A] private right of action would place the [agency's] 'interpretative function squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the [agency and] * * * would * * * deprive the [agency] of necessary flexibility and authority in creating, interpreting, and modifying * * * policy.' ") (quoting *New England Tel. & Tel. Co.* v. *Public Utils. Comm'n*, 742 F.2d 1, 6 (1st Cir. 1984) (Breyer, J.), *cert. denied*, 476 U.S. 1174 (1986)).

Each of the foregoing principles—federalism, the separation of powers, and the respect courts accord congressional delegation of authority to expert agencies—should inform judicial inquiry into whether a Spending Clause statute creates rights enforceable under § 1983. These considerations suggest that to confer such rights, the statute must unambiguously convey the intent to create individual rights and to permit those rights to be enforced by private actions in federal court. We turn now to whether FERPA meets that standard.

II. FERPA DOES NOT CONTAIN THE UNAMBIGUOUS EXPRESSION OF CONGRESSIONAL INTENT REQUIRED TO CREATE ENFORCEABLE PRIVATE RIGHTS.

A. FERPA's Text And Structure Do Not Create Rights Enforceable Under § 1983.

FERPA's operative provisions are not phrased in terms of individual rights. Instead, the statute merely conditions the availability of federal funds on an institution not having specified policies or practices. *See* 20 U.S.C. § 1232g(b)(1) ("[n]o funds shall be made available * * * to any educational agency or institution which has a policy or practice of permitting the release of education records * * * of students without * * * written consent"); *id.* § 1232g(b)(2) ("[n]o funds shall be made available * * * to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records [except as provided]"). FERPA's language and structure do not confer individual rights, but rather are "directed to the conditions schools must meet to receive federal funds." *Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, No. 00-1073 (U.S. Feb. 19, 2002), slip op. at 3. *See Sandoval*, 532 U.S. at 289 ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.' ") (quoting *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981)); *Pennhurst*, 451 U.S. at 24 n.18 (finding no individual right when statute conditioned funding on State not having "substandard *institutions*. Nothing reveals an intent to condition the grant of federal funds under the Act on the State's promise to provide [alleged rights] to *individuals*.") (emphases in original).

That is clear not only from the fact that FERPA's language addresses conditions on the receipt of funding, but also from the fact that the conditions refer to the recipient's "policy or practice." 20 U.S.C. §§ 1232g(b)(1), (2). Unlike the situa-

tion in *Wright* and *Wilder*, particular individuals are not accorded an entitlement to be treated in any particular manner. Individual parents and students are, of course, affected in significant ways by the policy choices reflected in FERPA, just as individual children were affected by the statutes at issue in *Suter* and *Blessing*. But Congress sought to implement its aims in FERPA and in those cases not by conferring individual rights, but by prohibiting recipients of federal funds from adopting a systemic "policy or practice." Like the statute in *Blessing*, FERPA does not create "an *individual* entitlement." *Blessing*, 520 U.S. at 343 (emphasis in original). Rather, the statute's plain language demonstrates that Congress was concerned with "*systemwide* performance," not with creating a "protected individual interest." *Id.* (emphasis in original). FERPA's "policy or practice" requirement is aimed at "the aggregate," rather than "whether the needs of any particular person have been satisfied." *Id.* *See Smith* v. *Duquesne Univ.*, 612 F. Supp. 72, 80 (W.D. Pa. 1985) (FERPA adopted to address "systemic, not individual" violations), *aff'd without op.*, 787 F.2d 583 (3d Cir. 1986).

Analyzing "the statutory provisions in detail, in light of the entire legislative enactment," *Suter*, 503 U.S. at 357, confirms this conclusion. Here, the provision that respondent asserts creates an individual right is FERPA's disclosure provision. First Amended Compl. ¶ 3.11; Opp. Cert. 13. *See Blessing*, 520 U.S. at 342 (plaintiff must "identify with particularity the rights [he] claim[s]"). Comparison of that provision—subsection (b) of 20 U.S.C. § 1232g—with other provisions in FERPA reveals that in the disclosure provision Congress used language particularly focused on systemwide performance and avoided any "rights" language. While subsection (a)(1), for example, which addresses access to student records, speaks in terms of the "right" of parents to inspect and review such records, *see* 20 U.S.C. §§ 1232g(a)(1)(A), (B), reference to "rights" is entirely

absent from the disclosure provision, subsection (b). The omission of any reference to "rights" in subsection (b) suggests that Congress did not intend to create an individual right to consent to disclosure of education records. *Barnhart* v. *Sigmon Coal Co.*, No. 00-1307 (U.S. Feb. 19, 2002), slip op. at 12 ("[I]t is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' ") (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).[5]

B. FERPA's Administrative Enforcement Scheme, Including Provision For Adjudicating Individual Complaints, Confirms That Congress Did Not Intend To Authorize Enforcement Under § 1983.

This conclusion is confirmed by considering the remedies that Congress chose to provide in FERPA itself. Those remedies are plainly incompatible with § 1983 rights. As this Court has noted, "[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds." *Pennhurst*, 451 U.S. at 28. Congress specifically addressed enforcement of FERPA conditions on federal funds in 20 U.S.C. § 1232g(f), entitled "[e]nforcement; termination of assistance." Under § 1232g(f), the Secretary of Education

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[5] For the other reasons set forth in this brief, we believe Congress created no rights enforceable under § 1983 when it enacted FERPA, even under the access provisions. *See Pennhurst*, 451 U.S. at 18 (rejecting argument that statutory provision is enforceable because it "speaks in terms of 'rights' "). But at the very least the focused approach mandated by this Court in *Blessing* confirms that no such rights were created under the disclosure provision on which respondent relies.

> shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

By authorizing the Secretary to take enforcement action "in accordance with this chapter"—Chapter 31 of Title 20, the General Education Provisions Act—FERPA expressly incorporates the broad remedies conferred on the Secretary under 20 U.S.C. §§ 1234c-1234f. Those remedies—invocable if a recipient "is failing to comply *substantially* with any requirement," *id.* § 1234c(a) (emphasis added)—include (1) withholding federal funds; (2) issuing an administrative complaint to compel compliance through a cease and desist order; and (3) entering into compliance agreements. *See id.* §§ 1234c(a)(1)-(3). The Secretary is also empowered to take "any other action authorized by law." *Id.* § 1234c(a)(4). That includes filing a civil enforcement action in federal court. *See, e.g., United States* v. *Miami Univ.*, 91 F. Supp. 2d 1132, 1138 (S.D. Ohio 2000) (holding that Department of Education was authorized under § 1234c(a)(4) to file suit to enforce FERPA).[6]

The facts that termination of federal financial assistance is to be a last resort only after efforts at voluntary compliance have failed, and only in cases of "substantial[ ]" noncompliance, further confirm that Congress did not intend FERPA to confer individual rights immediately enforceable in a § 1983 private damages action. Such an action for compensatory and punitive damages would be incompatible with the congressional judgment that schools should be given an

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[6] Because FERPA places conditions on the grant of federal funds, the Secretary also retains the inherent authority to sue a recipient of such funds to enforce those conditions. *See Miami Univ.*, 91 F. Supp. 2d at 1142-44 (citing cases).

opportunity for voluntary compliance before they are subjected to enforcement action. As this Court explained in addressing a related question in *Gebser*, "[w]here a statute's express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions." 524 U.S. at 290.

But Congress did not stop with providing that the Secretary shall take appropriate action, including termination of assistance, to enforce FERPA. Congress went on to address how individual complaints of violations of the Act were to be handled. This feature of FERPA plainly distinguishes this case from *Wright* and *Wilder*, and makes this an even stronger case than *Suter* or *Blessing* for finding no intent to confer individual rights enforceable under § 1983. Here again there was no suggestion that FERPA conferred rights that could be enforced under § 1983. Instead, Congress again looked to the Secretary of Education, providing that "[t]he Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of [FERPA] and complaints which may be filed concerning alleged violations of [FERPA]." 20 U.S.C. 1232g(g).

Pursuant to that statutory command, the Secretary has established the Family Policy Compliance Office ("FPCO"), designated the Office of Administrative Law Judges to act as the review board, *see* 34 C.F.R. § 99.60, and established a detailed grievance procedure. Under that procedure, FPCO investigates timely written complaints. *See id.* §§ 99.63-.66. Following its investigation, FPCO issues written notice of and the basis for its findings to the aggrieved party and the educational agency or institution named in the complaint. *Id.* § 99.66(b). If FPCO finds that an educational agency or institution has not complied with the Act, and the agency or institution does not do so within a specified period of time,

the Secretary may take appropriate enforcement action. *See* 20 U.S.C. §§ 1232g(f), 1234c; 34 C.F.R. § 99.67(a). As the First Circuit recently explained in rejecting an implied right of action under FERPA itself, "[t]he provision of a specific remedy replete with administrative safeguards argues persuasively that Congress fashioned FERPA to include precisely the remedial action that it delineated—and no other." *Frazier* v. *Fairhaven Sch. Comm.*, 276 F.3d 52, 69 (1st Cir. 2002).

Congress amended FERPA four months after enactment to respond to "extensive questioning and concern" about the Act and "perplexity among school officials and frustration among parents and students." Joint Statement in Explanation of Buckley/Pell Amendment, 120 Cong. Rec. 39,865-66 (1974). One step Congress took was to add a sentence to the subsection directing the Secretary to establish an office to adjudicate complaints under FERPA. The new sentence provides that "[e]xcept for the conduct of hearings, none of the functions of the Secretary under [FERPA] shall be carried out in any of the regional offices of [the] Department." 20 U.S.C. § 1232g(g). Congress took that unusual action "[b]ecause of the concern that regionalizing the enforcement of the law may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions * * *." Joint Statement, 120 Cong. Rec. 39,866.

By providing for a comprehensive and centralized administrative enforcement scheme, Congress plainly intended to concentrate the task of interpreting FERPA's ambiguous and technical requirements in the hands of an expert agency. Since its enactment, FERPA has given rise to an extraordinary volume and startling variety of interpretations by students and parents. Unlike the situation with the discrete financial requirements at issue in *Wright* and *Wilder*, questions under FERPA can arise every day in connection with any one of the 62 million covered students, *see* National Center for Educ. Statistics, U.S. Dep't of Educ., *Digest of*

Education Statistics 2001, at 52, 204 (forthcoming 2002), in a bewildering array of unanticipated circumstances. FPCO has issued hundreds of opinion letters that interpret the statute. *See* Dixie Snow Huefner & Lynn M. Daggett, *Commentary: FERPA Update: Balancing Access to and Privacy of Student Records*, 152 Ed. Law Rep. 469, 470 (2001) ("What once seemed like a relatively straightforward statute has become a cumbersome set of requirements with ambiguous parameters."); National Ass'n of College and Univ. Attorneys, *The Family Educational Rights and Privacy Act: A Legal Compendium* iii (Steven J. McDonald ed. 1999) (FERPA has "confused, frustrated and bedeviled college and university counsel").

Congress sensibly decided that the federal agency with technical expertise and familiarity with the educational settings in which such questions arise, rather than federal and state judges and juries in § 1983 actions around the country, should resolve the myriad technical questions regarding, for example, application of the statutory exceptions to FERPA's nondisclosure condition. Indeed, Congress directed the Department not simply to review complaints under FERPA, but to "adjudicat[e]" them. 20 U.S.C. § 1232g(g). *See Frazier*, 276 F.3d at 68 ("FERPA expressly authorizes the Secretary of Education—and only the Secretary—to take 'appropriate actions' to enforce its provisions. * * * This paradigm plainly indicates that Congress contemplated public, rather than private, enforcement."); *Norris by Norris* v. *Board of Educ. of Greenwood Cmty. Sch. Corp.*, 797 F. Supp. 1452, 1465 (S.D. Ind. 1992) ("FERPA provides expressly that the Secretary of Education is responsible for enforcing the provisions and protections of FERPA; Section 1983 does not create a private right of action for damages where the federal statute provides an exclusive administrative enforcement mechanism."); *Meury* v. *Eagle-Union Cmty. Sch. Corp.*, 714 N.E.2d 233, 239 (Ind. Ct. App. 1999) ("The enforcement provisions within FERPA explicitly provide that

the Secretary of Education is solely responsible for enforcement, thereby preempting a private cause of action [under § 1983]."), *transfer denied*, 735 N.E.2d 233 (Ind. 2000).

A holding by this Court that FERPA confers rights enforceable under § 1983 would precipitate a sharp increase in the number of such actions brought in federal court. This would place the burden of deciding FERPA claims on the courts rather than the administrative agency designated by Congress, and multiply the courts' involvement in narrow, technical disputes implicating "traditional state functions" concerning "the operation of the Nation's schools." *Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, *supra*, slip op. at 5-6, 9. *See, e.g.*, *Price* v. *Young*, 580 F. Supp. 1 (E.D. Ark. 1983) (presenting question whether anonymous faculty evaluations may be used to select high school students to honor society); *Moore* v. *Hyche*, 761 F. Supp. 112 (N.D. Ala. 1991) (parent of student denied admission to honors club sought access to faculty evaluations); *C.N.* v. *Ridgewood Bd. of Educ.*, 146 F. Supp. 2d 528 (D.N.J. 2001) (presenting question whether survey marked "voluntary" and "anonymous" provided parents and students sufficient notice under FERPA that survey was voluntary), *aff'd in part, rev'd in part and remanded*, __ F.3d __ (3d Cir. 2001) (Table).

Congress did not want a diffusion of enforcement authority under FERPA. It wanted the opposite. FERPA's pointed mandate to create a *centralized* enforcement system, *see* 20 U.S.C. § 1232g(g), contrasts with Congress' typical approach of permitting the Department of Education to enforce federal law within its ambit through its regional offices. The FERPA approach ensures that determinations regarding questions such as what constitutes an "education record" or student "directory information" and what institutional officials have a "legitimate educational interest" in information in student records will be made consistently, rather than in a patchwork of rulings in § 1983 actions by the 700 federal district court judges and thousands of state court judges across the country.

See Benjamin F. Sidbury, *The Disclosure Of Campus Crime: How Colleges And Universities Continue To Hide Behind The 1998 Amendment To FERPA And How Congress Can Eliminate The Loophole*, 26 J. Coll. & Univ. L. 755, 759 (2000) (there is "substantial debate, confusion, and litigation over what constitutes 'educational records' "). As Congress predicted, "multiple interpretations" of FERPA emanating from different jurisdictions would place a difficult burden on the Department in carrying out its responsibilities to adjudicate complaints and provide technical assistance. Joint Statement, 120 Cong. Rec. 39,866. Such a result—the logical consequence of inferring rights enforceable by § 1983 actions—is plainly incompatible with the uniform, unusually centralized administrative enforcement scheme the statute requires.

C. FERPA's Legislative History Contains No Hint Of An Intent To Allow Private Damages Actions, Or To Establish Radically Different Enforcement Regimes For Public And Private Schools.

The scant legislative history confirms that Congress did not intend to create rights enforceable under § 1983 when it enacted FERPA. *See Frazier*, 276 F.3d at 69 ("FERPA's legislative history is devoid of any support for the proposition that Congress intended to allow private parties to maintain causes of action for money damages."). FERPA was introduced as a late amendment to the Education Amendments of 1974 during the Senate floor debate, and was never the subject of committee hearings. The legislative history is limited to a brief discussion in the conference report, H. Conf. Rep. No. 93-1211, at 186-187 (1974); S. Conf. Rep. No. 93-1026, at 186-187 (1974), and the Senate floor debates. 120 Cong. Rec. 13,951-56, 14,232-35, 14,579-605 (1974). Nowhere in this abbreviated record is there a single mention of any intent to create individual rights enforceable under § 1983. Indeed, the legislative history confirms that to the extent members of Congress considered remedies for

noncompliance, they considered only the remedies expressly provided in the statute. *See, e.g.*, 120 Cong. Rec. 14,587 (1974) (Sen. Ervin) ("The penalties [*sic*] for noncompliance with this act would be a loss of * * * Federal funds.").[7]

As noted, widespread confusion and controversy about FERPA prompted Congress to amend the statute just four months after its passage. Pub. L. No. 93-568, § 2 (a), 88 Stat. 1858. *See* 120 Cong. Rec. 39,865-66. The amendment was introduced as part of an appropriations bill. Again the legislative history is abbreviated, and again there is no mention of any intent to create privately enforceable rights. *See* H. Rep. No. 93-1619, at 10 (1974). Congress has

[7] When Congress enacted FERPA, a variety of state law remedies existed for parents and students injured by publication of information from educational records. In addition to defamation claims, a majority of jurisdictions recognized a tort for invasion of privacy. *See Gravina* v. *Brunswick Corp.*, 338 F. Supp. 1, 3 (D.R.I. 1972) (noting a "definite trend" of jurisdictions allowing compensable privacy claims); *Peterson* v. *Idaho First Nat'l Bank*, 367 P.2d 284, 288 (Idaho 1961). State law supplied, and continues to supply, a broad range of remedies for harmful disclosure of student information. *See, e.g.*, *Warner* v. *St. Bernard Parish Sch. Bd.*, 99 F. Supp. 2d 748, 752 (E.D. La. 2000) (refusing to dismiss claim that school's release of educational record violated state constitutional right to privacy); *Sieck* v. *Oak Park-River Forest High Sch. Dist. No. 200*, 807 F. Supp. 73, 77 (N.D. Ill. 1992) (denying defendant's motion for summary judgment on state law claim of negligent release of student suspension memorandum); *Gravatt* v. *Columbia Univ.*, No. 86 C 1308, 1986 WL 11620, at *2 (N.D. Ill. Oct. 10, 1986) (possible for plaintiff to state defamation claim for disclosure of information from educational records); *Porten* v. *University of San Francisco*, 134 Cal. Rptr. 839, 843 (Ct. App. 1976) (alleged disclosure of grades stated prima facie claim of violation of state constitutional right of privacy); *Blair* v. *Union Free Sch. Dist. #6*, 324 N.Y.S.2d 222, 227-228 (Dist. Ct. 1971) (claim that school officials released student information stated a claim for infliction of mental distress).

amended FERPA nine more times, without any allusion to an intent to create rights enforceable under § 1983.[8] *See, e.g.*, 137 Cong. Rec. E2870 (1991) (Rep. Rhodes) (referring to termination of federal funds); S. Rep. No. 102-204, at 99 (1991) (same).

FERPA applies to educational institutions and agencies that receive federal funds, a class of entities that includes public schools, colleges, and universities as well as private ones, and nearly every college and university in the country. *See* Adele P. Kimmel, *et al.*, *The* Sandoval *Decision and its Implications for Future Civil Rights Enforcement*, 76 Fla. Bar J. 24, 27 (2002) (virtually all colleges and universities receive federal funds). Neither the language of FERPA nor its legislative history indicates an intent by Congress to create two separate enforcement schemes, one for public educational institutions and agencies, the other for private ones. On the contrary, FERPA specifies in its definitional provision that "the term 'educational agency or institution' means any public or private agency or institution which is the recipient of [federal] funds." 20 U.S.C. § 1232g(a)(3). Yet inferring in FERPA rights enforceable under § 1983 would create such a two-track enforcement system. Because, as courts have unanimously held, FERPA confers no direct private right of action,[9] parents and students may not sue

[8] Pub. L. No. 96-46, § 4(c), 93 Stat. 342; Pub. L. No. 96-88, title III, § 301, title V, § 507, 93 Stat. 677, 692; Pub. L. No. 99-514, § 2, 100 Stat. 2095; Pub. L. No. 101-542, title II, § 203, 104 Stat. 2385; Pub. L. No. 102-325, title XV, § 1555(a), 106 Stat. 840; Pub. L. No. 103-382, title II, §§ 212(b)(1), 249, 261(h), 108 Stat. 3913, 3924, 3928; Pub. L. No. 105-244, title IX, §§ 951, 952, 112 Stat. 1835, 1836; Pub. L. No. 106-386, Div. B, title VI, § 1601(d), 114 Stat. 1538; Pub. L. No. 107-56, title V, § 507, 115 Stat. 367.

[9] *Frazier*, 276 F.3d at 69; *Fay* v. *South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986); *Tarka* v. *Cunningham*, 917 F.2d 890, 891–892 (5th Cir. 1990); *Tarka* v. *Franklin*, 891 F.2d

private institutions for deviations from FERPA's funding conditions (except in the unusual case where, as here, the private institution is held to act under color of state law). But parents and students would, under the holding below, be permitted to file § 1983 actions against public institutions for the same conduct. As a theoretical matter, Congress might conceivably have intended to subject public and private institutions to completely different enforcement schemes, one limited to federal administrative adjudication and the other permitting private damages actions in federal court. But if Congress had intended two such radically different enforcement regimes, it is difficult to understand why it failed to provide a hint of that intent in the statute or legislative history.

D. Under This Court's Precedents, FERPA Does Not Give Rise To Rights Enforceable Under § 1983.

In light of the foregoing, FERPA fails to satisfy any of the three factors to which this Court has "traditionally looked" to determine whether a statute confers individual rights enforceable under § 1983. *Blessing*, 520 U.S. at 340-341. First, FERPA's disclosure provision was intended to regulate the policies and practices of educational institutions, not to confer on any particular litigant an individual right not to

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102, 104 (5th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); *Klein Indep. Sch. Dist.* v. *Mattox*, 830 F.2d 576, 579 (5th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988); *Girardier* v. *Webster College*, 563 F.2d 1267, 1276-77 (8th Cir. 1977); *Hartfield* v. *East Grand Rapids Pub. Schs.*, 960 F. Supp. 1259, 1264 (W.D. Mich. 1997); *Doe* v. *Knox County Bd. of Educ.*, 918 F. Supp. 181, 184 (E.D. Ky. 1996); *Odom* v. *Columbia Univ.*, 906 F. Supp. 188, 195 (S.D.N.Y. 1995); *Belanger* v. *Nashua, N.H., Sch. Dist.*, 856 F. Supp. 40, 42 n.4 (D.N.H. 1994); *Rothman* v. *Emory Univ.*, 828 F. Supp. 537, 542 (N.D. Ill. 1993); *Norris by Norris*, 797 F. Supp. at 1462; *Norwood* v. *Slammons*, 788 F. Supp. 1020, 1026 (W.D. Ark. 1991); *Smith* v. *Duquesne Univ.*, 612 F. Supp. at 80.

have his education records disclosed. *See id.* at 341. There is no doubt that FERPA's disclosure provision benefits students and parents, just as the statutes at issue in *Suter* and *Blessing* were intended to benefit children. But as the Court explained twenty years ago in the implied right of action context, "[t]he question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *California* v. *Sierra Club*, 451 U.S. at 294. *See Sandoval*, 532 U.S. at 289. Conditioning federal funds on institutions not having certain policies or practices adverse to students and parents, and requiring the Secretary to establish a remedial regime to which students or parents with complaints may resort, bespeak an intent to benefit students and parents—but not by conferring on them individual rights enforceable under § 1983.

Second, any individual nondisclosure "right" claimed by respondent under FERPA is necessarily vague and amorphous because FERPA does not confer on any *individual* the right to be free from specific disclosures. As it did with the statute at issue in *Blessing*, 520 U.S. at 343-344, Congress in FERPA aimed for a pattern of compliance, not perfect compliance. That is clear from the statute's phrasing in terms of a recipient's "policy or practice," and the statutory prerequisites to funding termination that any failure to comply be "substantial[ ]" and efforts at voluntary compliance fruitless. *See* 20 U.S.C. §§ 1232g(f), 1234c(a). Any particular disclosure thus does not, standing alone, constitute a breach of the funding condition allegedly giving rise to enforceable rights. For any given plaintiff, therefore, it is impossible to know whether he is among those "whose needs ultimately [may] go unmet." *Blessing*, 520 U.S. at 344.

Third, the only "binding obligation" that FERPA imposes on federal funds recipients with respect to disclosure of student records is conditioning federal funds on the recipient not having certain policies and practices. FERPA does not

impose a binding obligation with respect to any individual student's education records—and any such obligation certainly is not "unambiguous." *See id.* at 341. Further, even the obligation to refrain from certain policies and practices is vague and amorphous, in light of the ambiguity of key statutory terms and the vast range of records and circumstances that could be considered to be within the scope of this pathbreaking statute. To know whether a particular policy or practice is consistent with FERPA's funding conditions, a school—or a court—must determine whether, for example, it entails "education records" and "personally identifiable information," and whether a disclosure is to an official with a "legitimate educational interest"—terms that are subject to widely varying interpretations. *See generally Falvo, supra.*

For these reasons, the FERPA provision which respondent asserts confers rights enforceable under § 1983 differs from the provisions this Court held to be individually enforceable in *Wright* and *Wilder* and is more like the provisions the Court held not enforceable in *Suter* and *Blessing*. First, the requirements in *Wright* and *Wilder* "focused on the individual," *Wright*, 479 U.S. at 431, and conveyed specified monetary interests—in *Wright*, a limit on the amount of rent tenants could be charged, *id.*; in *Wilder*, monetary reimbursement to health care providers, 496 U.S. at 503. By contrast, FERPA's disclosure provision addresses only the presence of a "policy or practice" of disclosure of education records and thus does not confer a specific entitlement on any individual student or parent. In that regard, FERPA is similar to the statutes at issue in *Suter* and *Blessing*, which concerned systemic standards of performance rather than individual entitlements. *See Blessing*, 520 U.S. at 343.

Second, FERPA provides for a comprehensive, centralized federal administrative enforcement system, under which the Department of Education is to "adjudicat[e]" individual complaints under the statute, and is to do that at headquarters, to preclude "multiple interpretations" of the Act. 20 U.S.C.

§ 1232g(g); 120 Cong. Rec. 39,866. That differs from the statute in *Wilder*—which provided for *no* federal administrative enforcement scheme and under which "[m]ost [s]tates" precluded the type of claim at issue in that case, 496 U.S. at 523—and the statute in *Wright*, under which "Congress' aim was to provide a *decentralized* * * * administrative process." 479 U.S. at 425, 426 (emphasis added) (internal quotations omitted).

Third, the legislative history of FERPA contains no indication that Congress intended to create individual rights enforceable under § 1983—even though the resulting two-track enforcement system suggests Congress would have discussed such a regime had it in fact contemplated it—whereas this Court concluded from the legislative history in *Wright* that "private actions were anticipated," *id.* at 425, and from that in *Wilder* that "Congress * * * understood the Act to grant health care providers enforceable rights." 496 U.S. at 518.

III. CONGRESS PRECLUDED ENFORCEMENT UNDER § 1983 BY PROVIDING A COMPREHENSIVE ENFORCEMENT SCHEME INCOMPATIBLE WITH SUCH ACTIONS.

This Court has recognized that "§ 1983 is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy." *Smith* v. *Robinson*, 468 U.S. 992, 1012 (1984). Thus, even if a statute creates an enforceable "right" within the meaning of § 1983—and, as we have explained, FERPA does not—an action under § 1983 will still not lie if Congress has evinced an intent to " 'specifically foreclose[]' " such a remedy. *Blessing*, 520 U.S. at 341 (quoting *Smith*, 468 U.S. at 1005 n.9). This Court has found the requisite congressional intent where the statute itself contains "a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.*

Such a scheme exists under FERPA. First, as discussed above, the statute directs the Secretary of Education "to enforce [the Act] and * * * deal with violations of [the Act]." 20 U.S.C. § 1232g(f). Second, a range of remedies is available to the Secretary to enforce the Act, *see id.* §§ 1232g(f), 1234c(a)(1)-(3), including the broad power to take "any other action authorized by law." *Id.* § 1234c(a)(4). Third, FERPA expressly addresses individual grievances under the Act, directing the Secretary to establish an office to "investigat[e], process[], review[], and adjudicat[e] * * * complaints." *Id.* § 1232g(g). Fourth, the Department has set forth regulations detailing the complaint procedure, a procedure that may culminate in enforcement action by the Secretary. *See* 34 C.F.R. §§ 99.63-.67.

In view of these "unusually elaborate enforcement provisions," *Sea Clammers*, 453 U.S. at 13, it is difficult to imagine that Congress intended, *sub silentio*, a § 1983 remedy for FERPA violations. Indeed, FERPA's remedial scheme quite closely resembles other enforcement regimes this Court has found "sufficiently comprehensive" to demonstrate Congress' view that § 1983 actions are incompatible with the statute. *Id.* at 20.

In *Sea Clammers*, for instance, this Court determined that the enforcement schemes in the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, and the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1401 *et seq.*, evinced Congress' intent to foreclose a § 1983 remedy. The Environmental Protection Agency was authorized to enforce those statutes through noncompliance orders, civil suits, and civil and criminal penalties, and private parties were permitted to seek enforcement of the statutes (but not damages) by filing citizen suits. *See* 453 U.S. at 13-14. Here, too, the Secretary is authorized to use noncompliance orders and civil suits—as well as numerous other

remedies—as enforcement tools.[10] Private parties, meanwhile, are given the opportunity to seek enforcement of the Act by filing a complaint with FPCO, which may ultimately lead the Secretary to exercise one of FERPA's numerous enforcement options to achieve compliance.

Similarly, in *Smith* v. *Robinson*, this Court concluded that Congress intended the remedial scheme established under the Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.*, to be the "exclusive avenue" for asserting constitutional claims to a publicly-financed special education. 468 U.S. at 1009. There, the statute established a local administrative review procedure to ensure the provision of appropriate educational opportunities to disabled children, including a complaint process that could ultimately result in federal judicial review. *Id.* at 1009-11. *See also* 20 U.S.C. § 1415 (1982). FERPA also establishes a "carefully tailored" administrative mechanism, 468 U.S. at 1009—at the federal, not local, level—to ensure compliance, which may also ultimately lead to federal court. *See* 20 U.S.C. § 1234c(a)(4) (authorizing Secretary to take "any other action authorized by law"). As this Court recognized in *Smith*, "[a]llowing a plaintiff to circumvent [such] administrative remedies" would "render [them] superfluous." 468 U.S. at 1011, 1012.

At the same time, FERPA's enforcement scheme differs in material respects from those this Court has found not "sufficiently comprehensive" to preclude resort to § 1983. For instance, in *Wright*, the Court rejected the argument that Congress intended to vest in the Department of Housing and Urban Development ("HUD") the exclusive authority to enforce the Brooke Amendment to the Housing Act, 42 U.S.C. § 1401 *et seq*. The Court was particularly concerned

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[10] Although the Secretary may not be authorized to seek civil or criminal penalties, the Secretary is authorized to remedy FERPA violations by cutting off federal funds, and thus is able to impose a monetary sanction upon violators. *See* 20 U.S.C. § 1234c(a)(1).

that the only remedy afforded private parties was a local grievance procedure, and that "the statute [did] not require and HUD [had] not provided any formal procedure for tenants to bring [complaints] to HUD's attention." 479 U.S. at 428. Because HUD infrequently conducted audits of local public housing authorities subject to the Brooke Amendment, "there [was] little occasion [for HUD] to exercise [its] power[s]" to sue to enforce annual contributions contracts or to cut off federal funds. *Id.* Here, in contrast, FERPA *does* require and the Department of Education *has* provided a formal procedure for parents and students to bring complaints to the Department's attention. *See* 20 U.S.C. § 1232g(g); 34 C.F.R. §§ 99.63-.67.

Likewise, in *Wilder*, the Court held that the Medicaid Act, 42 U.S.C. § 1396 *et seq.*, failed to demonstrate Congress' intent to preclude a § 1983 action challenging the method by which a State reimbursed providers, where the Act afforded only a "limited" state administrative procedure for reviewing provider claims for payment, and where the Secretary of Health and Human Services had only "limited oversight" of the payment rates set by the States. 496 U.S. at 521-523. Most recently, in *Blessing*, this Court held that the federal law at issue there did not create a "sufficiently comprehensive" enforcement scheme where that law contained "*no* private remedy—either judicial or administrative—through which aggrieved persons [could] seek redress," and where the Secretary of Health and Human Services had only "limited powers" to audit and cut off federal funding. 520 U.S. at 347-348 (emphasis added).

Such enforcement regimes simply do not compare with one which (1) provides private parties with a detailed federal administrative procedure for bringing to the Secretary's attention *any* alleged violation of the Act; (2) grants the Department of Education the power to "investigat[e], process[], review[], and adjudicat[e]" violations and complaints of violations, 20 U.S.C. § 1232g(g); and (3) provides the

Secretary with "so many specific statutory remedies," *Sea Clammers*, 453 U.S. at 20, including "any * * * action authorized by law." 20 U.S.C. § 1234c(a)(4). In addition, with respect to the availability of individual redress, FERPA's enforcement scheme leaves intact the right to sue for damages under state law for invasion of privacy or other torts committed in connection with personally identifiable education records. *See* note 7, *supra*. Doe in this case received some $600,000 for defamation and invasion of privacy under state law. Pet. App. 9a.[11] In light of all the foregoing, it cannot be that Congress unambiguously intended but just neglected to mention that parties may seek additional enforcement by filing a federal damages action under § 1983.

IV. RESPONDENT IS NOT A PARTY TO THE SPENDING CLAUSE CONTRACT AND ACCORDINGLY HAS NO RIGHT UNDER § 1983 TO SUE ON THE CONTRACT.

Quite apart from the foregoing, FERPA confers no rights enforceable by parents and students under § 1983 because parents and students are not parties to the Spending Clause contract. Under the FERPA contract, educational agencies and institutions agree with the Federal Government to refrain from certain policies and practices as a condition of federal funding. Respondent, like other students and parents, was at most a third-party beneficiary of this contract; he was certainly not a party.

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[11] The availability of state law remedies is not, of course, itself a basis for supplanting a § 1983 federal remedy. *See Wright*, 479 U.S. at 429. But where, as here, there is no evidence that Congress regarded compensatory relief available under state law as in any way inadequate, the absence of a compensation provision in the federal remedial scheme should not prevent a finding that the federal scheme is sufficiently comprehensive to preclude resort to § 1983.

"Until relatively recent times, the third-party beneficiary was generally regarded as a stranger to the contract, and could not sue upon it." *Blessing*, 520 U.S. at 349 (Scalia, J., concurring) (citing 1 William W. Story, *A Treatise on the Law of Contracts* 549-550 (4th ed. 1856)). This was generally the law in 1871,[12] when § 1983 was originally enacted as § 1 of the Civil Rights Act of 1871. *Mitchum* v. *Foster*, 407 U.S. 225, 238 (1972). The Congress that enacted § 1983, therefore, would not have regarded Spending Clause legislation as conferring the right to sue upon the third-party beneficiaries of the promises made by the recipients of federal funds.

That contemporaneous understanding is directly pertinent in assessing the scope of § 1983. *See City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981) ("It is by now well

[12] *See, e.g.*, 1 Francis Hilliard, *The Law of Contracts* 422 (1872) ("In general, the party with whom a contract is made is the proper plaintiff in a suit upon such contract, although the beneficial interest is in other persons."); 1 William W. Story, *A Treatise on the Law of Contracts* 509 (M. Bigelow ed. 1874) ("tendency of the courts" is "that no stranger to the consideration can take advantage of a contract, though made for his benefit"); Christopher C. Langdell, *A Summary of the Law of Contracts* 79 (2d ed. 1880) ("A binding promise vests in the promisee, and in him alone, a right to compel performance of the promise"); 2 Francis Wharton, *A Commentary on the Law of Contracts* 155 (1882) ("no one can sue on a contract to which he was not a party"): J. I. Clark Hare, *The Law of Contracts* 193 (1887) ("[i]t is equally well settled, on a principle common to every system of jurisprudence, that the obligation of a contract is under ordinary circumstances confined to the parties, and cannot be enforced by third parties").

The law at the time recognized only narrow exceptions to this general rule, such as where a third party was related to the promisee, or where the third party was owed a duty by the promisee as the result of performance amounting to consideration. *See* 2 Wharton, *supra*, at 162-163. Neither exception has any application here.

settled that the tort liability created by § 1983 cannot be understood in a historical vacuum."). As this Court has stated, "[o]ne important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, * * * and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 67 (1989) (quotation omitted). *See Kalina* v. *Fletcher*, 522 U.S. 118, 123 (1997) ("Congress intended [§ 1983] to be construed in the light of common-law principles that were well-settled at the time of its enactment."). It is now generally accepted that third-party beneficiaries *do* have enforceable rights under a contract, *see* 13 Samuel Williston, *A Treatise on the Law of Contracts* § 37:12, at 103 (Richard A. Lord ed., 4th ed. 2000) ("By the mid-1940's, * * * [t]he great majority of American courts permit[ted] a recovery by the third party beneficiary whether he be a donee beneficiary or creditor beneficiary"), but that was not the case when Congress enacted § 1983, and it is the common law at that time—not today—that informs the question of legislative intent. *See Blessing*, 520 U.S. at 350 (Scalia, J., concurring). The Court has frequently construed the reach of § 1983 in accord with the common law as it existed in 1871.[13] That approach leads to the conclusion that FERPA, as Spending Clause legislation, does not confer on the beneficiaries of funding conditions rights enforceable under § 1983. *See Westside Mothers* v. *Haveman*, 133 F. Supp. 2d 549, 581 (E.D. Mich. 2001) (in light of 1871 rule on third-party beneficiaries, "§ 1983 independently creates

[13] *See, e.g., Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993) (prosecutorial immunity); *Fact Concerts*, *supra* (municipal immunity from punitive damages); *Carey* v. *Piphus*, 435 U.S. 247 (1978) (elements of damages); *Pierson* v. *Ray*, 386 U.S. 547 (1967) (absolute immunity for state judges and "good faith and probable cause" defense for police officers); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) (absolute immunity for state legislators).

no right for beneficiaries of federal programs enacted pursuant to the Spending Power to sue") (Medicaid statute).[14]

This conclusion is consistent with this Court's repeated admonition that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S. at 17. "By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of this participation." *Id.* It is difficult to see how exposure to § 1983 damages actions can be considered an "unambiguous" condition expressed in a "clear voice" when the existence of a federal right enforceable under § 1983 has to be intuited from the statute—or, worse yet, its legislative history—pursuant to an indeterminate, multi-factor balancing test which, like all such tests, is "hard to apply" and "jettison[s] relative predictability for the open-ended rough-and-tumble of factors." *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). It is particularly difficult to conclude that Congress, when it enacted FERPA six years before the Court "ma[de] new law" in *Maine* v. *Thiboutot* by holding § 1983 applicable to statutes,

[14] The Congress that enacted § 1983 would also not have readily assumed the availability of the tort remedy it created, *see Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 305-306 (1986); *Fact Concerts*, 453 U.S. at 258, for claims essentially based on contract. *See* J. I. Clarke Hare, *supra*, at 153 ("the distinction between tort and contract is fundamental"). Nor is it clear that the conditions in Spending Clause legislation qualify as "laws" under § 1983. Such conditions only become operative when the contract is accepted by a recipient; it is the resulting contract, not the federal legislation itself, that gives rise to obligations and allegedly enforceable rights. Section 1983, however, does not cover contracts. *Cf. United States* v. *Morgan*, 230 F.3d 1067, 1073 (8th Cir. 2000) ("Congress may indirectly regulate state conduct by attaching 'strings' to grants of money given to state and local governments, but those strings aren't *laws*.") (Bye, J., concurring) (emphasis in original; citation omitted), *cert. denied*, 122 S. Ct. 62 (2001).

Thiboutot, 448 U.S. at 33 (Powell, J., dissenting), spoke with the clarity demanded in Spending Clause legislation.

* * *

For the Nation's elementary and secondary schools and its colleges and universities, the Court's answer to the question presented in this case will likely rank among the most consequential issued in the education field. Many millions of education records, as defined by FERPA, are generated every year at these institutions. The records, as FERPA defines them, come in a vast variety of forms, some of which are far from self-evident, and are properly accessible by millions of teachers and other authorized persons. The prospect that errant disclosure of such records could result in a student's or parent's lawsuit for damages under FERPA is an ominous one for educators, for education itself, and for the federal judicial system. "This Court can be insensible neither to the magnitude nor delicacy of this question." *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 625 (1819).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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STATUTORY AND REGULATORY ADDENDUM

42 U.S.C. § 1983 provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

20 U.S.C. § 1232g provides: [1]

§ 1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

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[1] Language added since 1994 is in brackets.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in

accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an

employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) (i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3)[, or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3)];

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted—

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if—

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of Title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J)(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any

officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena.

[Nothing in subparagraph (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.]

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation

of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of Title 18), [or a nonforcible sex offense,] the [final] results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime [or offense] with respect to such crime [or offense].

[(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding—

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(7)(A) Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 14071 of Title 42 concerning registered sex offenders who are required to register under such section.

(B) The Secretary shall take appropriate steps to notify educational institutions that disclosure of information described in subparagraph (A) is permitted.]

(c) Surveys or data-gathering activities; regulations

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Disciplinary records; disclosure

Nothing in this section shall prohibit an educational agency or institution from—

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

[(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this Act or the Higher Education Act of 1965 [20 U.S.C.A. § 1001 et seq.] shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if—

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a).

(j) Investigation and prosecution of terrorism

(1) In general

Notwithstanding subsections (a) through (i) or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational

agency or institution to permit the Attorney General (or his designee) to—

(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of Title 18, or an act of domestic or international terrorism as defined in section 2331 of that title; and

(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

(2) Application and approval

(A) In general

An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain information described in paragraph (1)(A).

(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).

(3) Protection of educational agency or institution

An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.

(4) Record-keeping

Subsection (b)(4) of this section does not apply to education records subject to a court order under this subsection.]

20 U.S.C. § 1234c provides:

§ 1234c. Remedies for existing violations

(a) Whenever the Secretary has reason to believe that any recipient of funds under any applicable program is failing to comply substantially with any requirement of law applicable to such funds the Secretary may—

(1) withhold further payments under that program, as authorized by section 1234d of this title;

(2) issue a complaint to compel compliance through a cease and desist order of the Office, as authorized by section 1234e of this title;

(3) enter into a compliance agreement with a recipient to bring it into compliance, as authorized by section 1234f of this title; or

(4) take any other action authorized by law with respect to the recipient.

(b) Any action, or failure to take action, by the Secretary under this section shall not preclude the Secretary from seeking a recovery of funds under section 1234a of this title.

Selected Provisions of Title 34 of the Code of Federal Regulations, Part 99:

PART 99—FAMILY EDUCATION RIGHTS AND PRIVACY

Subpart A—General

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) Except as otherwise noted in § 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if—

(1) The educational institution provides educational services or instruction, or both, to students; or

(2) The educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.

(b) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(c) The Secretary considers funds to be made available to an educational agency or institution if funds under one or more of the programs referenced in paragraph (a) of this section—

(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or

(2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (titles IV–A–1 and IV–B, respectively, of the Higher Education Act of 1965, as amended).

(d) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

§ 99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 444 of the General Education Provisions Act, as amended.

§ 99.3 What definitions apply to these regulations?

The following definitions apply to this part:

Act means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 444 of the General Education Provisions Act.

Attendance includes, but is not limited to:

(a) Attendance in person or by correspondence; and

(b) The period during which a person is working under a work-study program.

Dates of attendance. (a) The term means the period of time during which a student attends or attended an educational agency or institution. Examples of dates of attendance include an academic year, a spring semester, or a first quarter.

(b) The term does not include specific daily records of a student's attendance at an educational agency or institution.

Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (*e.g.*, undergraduate or graduate; full-time or part-time), participation in officially

recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.

Disciplinary action or proceeding means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means.

Educational agency or institution means any public or private agency or institution to which this part applies under § 99.1(a).

Education records. (a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8.

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution.

Eligible student means a student who has reached 18 years of age or is attending an institution of postsecondary education.

Institution of postsecondary education means an institution that provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

Party means an individual, agency, institution, or organization.

Personally identifiable information includes, but is not limited to:

(a) The student's name;

(b) The name of the student's parent or other family member;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number or student number;

(e) A list of personal characteristics that would make the student's identity easily traceable; or

(f) Other information that would make the student's identity easily traceable.

Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.

Secretary means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

Student, except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

§ 99.4 What are the rights of parents?

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution

has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

§ 99.5 What are the rights of students?

(a) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) An individual who is or has been a student at an educational institution and who applies for admission at another component of that institution does not have rights under this part with respect to records maintained by that other component, including records maintained in connection with the student's application for admission, unless the student is accepted and attends that other component of the institution.

§ 99.6 [Reserved]

§ 99.7 What must an educational agency or institution include in its annual notification?

(a)(1) Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act and this part.

(2) The notice must inform parents or eligible students that they have the right to—

(i) Inspect and review the student's education records;

(ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;

(iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and § 99.31 authorize disclosure without consent; and

(iv) File with the Department a complaint under §§ 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of the Act and this part.

(3) The notice must include all of the following:

(i) The procedure for exercising the right to inspect and review education records.

(ii) The procedure for requesting amendment of records under § 99.20.

(iii) If the educational agency or institution has a policy of disclosing education records under § 99.31(a)(1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

(b) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights.

(1) An educational agency or institution shall effectively notify parents or eligible students who are disabled.

(2) An agency or institution of elementary or secondary education shall effectively notify parents who have a primary or home language other than English.

§ 99.8 What provisions apply to records of a law enforcement unit?

(a)(1) *Law enforcement unit* means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or noncommissioned security guards, that is officially authorized or designated by that agency or institution to—

(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution.

(2) A component of an educational agency or institution does not lose its status as a *law enforcement unit* if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

(b)(1) Records of a law enforcement unit means those records, files, documents, and other materials that are—

(i) Created by a law enforcement unit;

(ii) Created for a law enforcement purpose; and

(iii) Maintained by the law enforcement unit.

(2) Records of a law enforcement unit does not mean—

(i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or

(ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.

(c)(1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.

(2) Education records, and personally identifiable information contained in education records, do not lose their

status as education records and remain subject to the Act, including the disclosure provisions of § 99.30, while in the possession of the law enforcement unit.

(d) The Act neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records.

Subpart B—What Are the Rights of Inspection and Review of Education Records?

§ 99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under § 99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records. This provision applies to—

(1) Any educational agency or institution; and

(2) Any State educational agency (SEA) and its components.

(i) For the purposes of subpart B of this part, an SEA and its components constitute an educational agency or institution.

(ii) An SEA and its components are subject to subpart B of this part if the SEA maintains education records on students who are or have been in attendance at any school of an educational agency or institution subject to the Act and this part.

(b) The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

(c) The educational agency or institution, or SEA or its component shall respond to reasonable requests for explanations and interpretations of the records.

(d) If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and

review the student's education records, the educational agency or institution, or SEA or its component, shall—

(1) Provide the parent or eligible student with a copy of the records requested; or

(2) Make other arrangements for the parent or eligible student to inspect and review the requested records.

(e) The educational agency or institution, or SEA or its component shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an education agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of *Education records* in § 99.3, the student may have those records reviewed by a physician or other appropriate professional of the student's choice.

§ 99.11 May an educational agency or institution charge a fee for copies of education records?

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

§ 99.12 What limitations exist on the right to inspect and review records?

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.

(b) A postsecondary institution does not have to permit a student to inspect and review education records that are:

(1) Financial records, including any information those records contain, of his or her parents;

(2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and

(3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if:

(i) The student has waived his or her right to inspect and review those letters and statements; and

(ii) Those letters and statements are related to the student's:

(A) Admission to an educational institution;

(B) Application for employment; or

(C) Receipt of an honor or honorary recognition.

(c)(1) A waiver under paragraph (b)(3)(i) of this section is valid only if:

(i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and

(ii) The waiver is made in writing and signed by the student, regardless of age.

(2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall:

(i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and

(ii) Use the letters and statements of recommendation only for the purpose for which they were intended.

(3)(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.

(ii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

Subpart C—What Are the Procedures for Amending Education Records?

§ 99.20 How can a parent or eligible student request amendment of the student's education records?

(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record.

(b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

(c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.

§ 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the

education records is inaccurate, misleading, or in violation of the privacy rights of the student.

(b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall:

(i) Amend the record accordingly; and

(ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall:

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

§ 99.22 What minimum requirements exist for the conduct of a hearing?

The hearing required by § 99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

Subpart D—May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?

§ 99.30 Under what conditions is prior consent required to disclose information?

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31.

(b) The written consent must:

(1) Specify the records that may be disclosed;

(2) State the purpose of the disclosure; and

(3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section:

(1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and

(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed.

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll.

(3) The disclosure is, subject to the requirements of § 99.35, to authorized representatives of—

(i) The Comptroller General of the United States;

(ii) The Attorney General of the United States;

(iii) The Secretary; or

(iv) State and local educational authorities.

(4)(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to:

(A) Determine eligibility for the aid;

(B) Determine the amount of the aid;

(C) Determine the conditions for the aid; or

(D) Enforce the terms and conditions of the aid.

(ii) As used in paragraph (a)(4)(i) of this section, *financial aid* means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(5)(i) The disclosure is to State and local officials or authorities to whom this information is specifically—

(A) Allowed to be reported or disclosed pursuant to State statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or

(B) Allowed to be reported or disclosed pursuant to State statute adopted after November 19, 1974, subject to the requirements of § 99.38.

(ii) Paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type of State or local officials to whom disclosures may be made under that paragraph.

(6)(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to:

(A) Develop, validate, or administer predictive tests;

(B) Administer student aid programs;

(C) Improve instruction.

(ii) The agency or institution may disclose information under paragraph (a)(6)(i) of this section only if:

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization; and

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted.

(iii) If this Office determines that a third party outside the educational agency or institution to whom information is disclosed under this paragraph (a)(6) violates paragraph (a)(6)(ii)(B) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

(iv) For the purposes of paragraph (a)(6) of this section, the term *organization* includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents, as defined in § 99.3, of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986.

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with—

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

(iii)(A) If an educational agency or institution initiates legal action against a parent or student, the educational agency or institution may disclose to the court, without a court order or subpoena, the education records of the student that are relevant for the educational agency or institution to proceed with the legal action as plaintiff.

(B) If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.

(11) The disclosure is information the educational agency or institution has designated as "directory information", under the conditions described in § 99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(13) The disclosure, subject to the requirements in § 99.39, is to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. The disclosure may only include the final results of the disciplinary proceeding conducted by the institution of postsecondary education with respect to that alleged crime or offense. The institution may disclose the final results of the disciplinary proceeding,

regardless of whether the institution concluded a violation was committed.

(14)(i) The disclosure, subject to the requirements in § 99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that—

(A) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and

(B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

(ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.

(iii) This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.

(15)(i) The disclosure is to a parent of a student at an institution of postsecondary education regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if—

(A) The institution determines that the student has committed a disciplinary violation with respect to that use or possession; and

(B) The student is under the age of 21 at the time of the disclosure to the parent.

(ii) Paragraph (a)(15) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from disclosing information.

(b) Paragraph (a) of this section does not forbid an educational agency or institution from disclosing, nor does it

require an educational agency or institution to disclose, personally identifiable information from the education records of a student to any parties under paragraphs (a)(1) through (11), (13), (14), and (15) of this section.

§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?

(a)(1) An educational agency or institution shall maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student.

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include:

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(b) If an educational agency or institution discloses personally identifiable information from an education record with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include:

(1) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(2) The legitimate interests under § 99.31 which each of the additional parties has in requesting or obtaining the information.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.

(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in § 99.31(a) (1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to:

(1) The parent or eligible student;

(2) A school official under § 99.31(a)(l);

(3) A party with written consent from the parent or eligible student;

(4) A party seeking directory information; or

(5) A party seeking or receiving the records as directed by a Federal grand jury or other law enforcement subpoena and the issuing court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

§ 99.33 What limitations apply to the redisclosure of information?

(a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of

the information on behalf of the educational agency or institution if:

(1) The disclosures meet the requirements of § 99.31; and

(2) The educational agency or institution has complied with the requirements of § 99.32(b).

(c) Paragraph (a) of this section does not apply to disclosures made to parents of dependent students under § 99.31(a)(8), to disclosures made pursuant to court orders, lawfully issued subpoenas, or litigation under § 99.31(a)(9), to disclosures of directory information under § 99.31(a)(11), to disclosures made to a parent or student under § 99.31(a)(12), to disclosures made in connection with a disciplinary proceeding under § 99.31(a)(14), or to disclosures made to parents under § 99.31(a)(15).

(d) Except for disclosures under § 99.31(a) (9), (11), and (12), an educational agency or institution shall inform a party to whom disclosure is made of the requirements of this section.

(e) If this Office determines that a third party improperly rediscloses personally identifiable information from education records in violation of § 99.33(a) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

(a) An educational agency or institution that discloses an education record under § 99.31(a)(2) shall:

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:

(i) The disclosure is initiated by the parent or eligible student; or

(ii) The annual notification of the agency or institution under § 99.6 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll;

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if:

(1) The student is enrolled in or receives services from the other agency or institution; and

(2) The disclosure meets the requirements of paragraph (a) of this section.

§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

(a) The officials listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs.

(b) Information that is collected under paragraph (a) of this section must:

(1) Be protected in a manner that does not permit personal identification of individuals by anyone except the officials referred to in paragraph (a) of this section; and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if:

(1) The parent or eligible student has given written consent for the disclosure under § 99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) Nothing in this Act or this part shall prevent an educational agency or institution from—

(1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community;

(2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or

(3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.

(c) Paragraphs (a) and (b) of this section will be strictly construed.

§ 99.37 What conditions apply to disclosing directory information?

(a) An educational agency or institution may disclose directory information if it has given public notice to parents

of students in attendance and eligible students in attendance at the agency or institution of:

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without meeting the conditions in paragraph (a) of this section.

§ 99.38 What conditions apply to disclosure of information as permitted by State statute adopted after November 19, 1974, concerning the juvenile justice system?

(a) If reporting or disclosure allowed by State statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under § 99.31(a)(5)(i)(B).

(b) The officials and authorities to whom the records are disclosed shall certify in writing to the educational agency or institution that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student.

§ 99.39 What definitions apply to the nonconsensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings

concerning crimes of violence or non-forcible sex offenses?

As used in this part:

Alleged perpetrator of a crime of violence is a student who is alleged to have committed acts that would, if proven, constitute any of the following offenses or attempts to commit the following offenses that are defined in appendix A to this part:

Arson

Assault offenses

Burglary

Criminal homicide—manslaughter by negligence

Criminal homicide—murder and nonnegligent manslaughter

Destruction/damage/vandalism of property

Kidnapping/abduction

Robbery

Forcible sex offenses.

Alleged perpetrator of a nonforcible sex offense means a student who is alleged to have committed acts that, if proven, would constitute statutory rape or incest. These offenses are defined in appendix A to this part.

Final results means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student.

Sanction imposed means a description of the disciplinary action taken by the institution, the date of its imposition, and its duration.

Violation committed means the institutional rules or code sections that were violated and any essential findings

supporting the institution's conclusion that the violation was committed.

Subpart E—What Are the Enforcement Procedures?

§ 99.60 What functions has the Secretary delegated to the Office and to the Office of Administrative Law Judges?

(a) For the purposes of this subpart, *Office* means the Family Policy Compliance Office, U.S. Department of Education.

(b) The Secretary designates the Office to:

(1) Investigate, process, and review complaints and violations under the Act and this part; and

(2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Office of Administrative Law Judges to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs. The term *applicable program* is defined in section 400 of the General Education Provisions Act.

§ 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it shall notify the Office within 45 days, giving the text and citation of the conflicting law.

§ 99.62 What information must an educational agency or institution submit to the Office?

The Office may require an educational agency or institution to submit reports containing information necessary to resolve complaints under the Act and the regulations in this part.

§ 99.63 Where are complaints filed?

A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, DC 20202–4605.

§ 99.64 What is the complaint procedure?

(a) A complaint filed under § 99.63 must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred.

(b) The Office investigates each timely complaint to determine whether the educational agency or institution has failed to comply with the provisions of the Act or this part.

(c) A timely complaint is defined as an allegation of a violation of the Act that is submitted to the Office within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation.

(d) The Office may extend the time limit in this section for good cause shown.

§ 99.65 What is the content of the notice of complaint issued by the Office?

(a) The Office notifies the complainant and the educational agency or institution in writing if it initiates an investigation of a complaint under § 99.64(b). The notice to the educational agency or institution—

(1) Includes the substance of the alleged violation; and

(2) Asks the agency or institution to submit a written response to the complaint.

(b) The Office notifies the complainant if it does not initiate an investigation of a complaint because the complaint fails to meet the requirements of § 99.64.

§ 99.66 What are the responsibilities of the Office in the enforcement process?

(a) The Office reviews the complaint and response and may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant and the educational agency or institution written notice of its findings and the basis for its findings.

(c) If the Office finds that the educational agency or institution has not complied with the Act or this part, the notice under paragraph (b) of this section:

(1) Includes a statement of the specific steps that the agency or institution must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily.

§ 99.67 How does the Secretary enforce decisions?

(a) If the educational agency or institution does not comply during the period of time set under § 99.66(c), the Secretary may, in accordance with part E of the General Education Provisions Act—

(1) Withhold further payments under any applicable program;

(2) Issue a compliant to compel compliance through a cease-and-desist order; or

(3) Terminate eligibility to receive funding under any applicable program.

(b) If, after an investigation under § 99.66, the Secretary finds that an educational agency or institution has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution written notice of the decision and the basis for the decision.

Selected Provisions of Chapter 180-75 of the Washington Administrative Code (1997)

CHAPTER 180-75—PROFESSIONAL CERTIFICATION—GENERAL PROVISIONS

WAC 180-75-003 Authority. The authority for this chapter is RCW 28A.410.010 which authorizes the state board of education to establish, publish, and enforce rules and regulations determining eligibility for and certification of personnel employed in the common schools of this state. (Note: RCW 28A.195.010 (3)(a) requires most private school classroom teachers to hold appropriate Washington state certification with few exceptions.)

WAC 180-75-005 Purpose. The purpose of this chapter is to incorporate into one chapter the general certification requirements applicable to all permits and certificates.

WAC 180-75-016 Equivalency of standards. Reasonable flexibility in interpretation of the requirements contained in this chapter and in chapters 180-77, 180-78 and 180-79 WAC may be applied consistent with the intent and spirit of the requirements of the appropriate chapter. For example, advanced degrees in the same or related fields may be substituted for required lesser degrees. An annual report of the use of this rule shall be submitted to the state board of education by the superintendent of public instruction.

WAC 180-75-017 Denial of recommendation for certification or endorsement by approved professional preparation training institutions. Any person whose application for certification or for an endorsement is denied for recommendation to the superintendent of public instruction by an institution of higher education within the state with an approved professional preparation program, after exhausting any appeal procedures established by such institution, may apply directly to the superintendent of public instruction for such certificate or endorsement.

WAC 180-75-045 Certificate validity. Any certificate issued pursuant to chapters 180-77 or 180-79 WAC or previous standards of the state board of education shall entitle the holder thereof to be employed by a public or nonpublic school for the performance of duties encompassed by the type of certificate as specified in WAC 180-75-055, if such certification is required by statute or rules of the state board of education, unless such certificate is under suspension or until such certificate expires, lapses, or is revoked.

* * *

WAC 180-75-050 Certificate required. Persons serving as teachers in public or private schools or as principals or educational staff associates in public schools and in vocational positions as established by chapter 180-77 WAC shall hold certificates authorized by the state board of education for service in the respective roles.

* * *

WAC 180-75-081 Good moral character and personal fitness—Definition. As used in this chapter, the terms "good moral character and personal fitness" means character and personal fitness necessary to serve as a certificated employee in schools in the state of Washington, including character and personal fitness to have contact with, to teach, and to perform supervision of children. Good moral character and personal fitness includes, but is not limited to, the following:

(1) No conviction of any felony crime involving:

(a) The physical neglect of a child under chapter 9A.42 RCW;

(b) The physical injury or death of a child under chapter 9A.32 or 9A.36 RCW, excepting motor vehicle violations under chapter 46.61 RCW;

(c) The sexual exploitation of a child under chapter 9.68A RCW;

(d) Sexual offenses where a child is the victim under chapter 9A.44 RCW;

(e) The promotion of prostitution of a child under chapter 9A.88 RCW;

(f) The sale or purchase of a child under RCW 9A.64.030;

(g) *Provided*, That the general classes of felony crimes referenced within this subsection shall include equivalent federal and crimes in other states committed against a child;

(h) *Provided further*, That for the purpose of this subsection "child" means a minor as defined by the applicable state or federal law;

(i) *Provided further*, That for the purpose of this subsection "conviction" shall include a guilty plea.

(2) No conviction of any crime within the last ten years, including motor vehicle violations, which would materially and substantially impair the individual's worthiness and ability to serve as a professional within the public and private schools of the state. In determining whether a particular conviction would materially and substantially impair the individual's worthiness and ability to practice, the following and any other relevant considerations shall be weighed:

(a) Age and maturity at the time the criminal act was committed;

(b) The degree of culpability required for conviction of the crime and any mitigating factors, including motive for commission of the crime;

(c) The classification of the criminal act and the seriousness of the actual and potential harm to persons or property;

(d) Criminal history and the likelihood that criminal conduct will be repeated;

(e) The permissibility of service as a professional educator within the terms of any parole or probation;

(f) Proximity or remoteness in time of the criminal conviction;

(g) Any evidence offered which would support good moral character and personal fitness;

(h) If this subsection is applied to a person certified under the laws of the state of Washington in a suspension or revocation action, the effect on the education profession, including any chilling effect, shall be weighed; and

(i) In order to establish good moral character and personal fitness despite the criminal conviction, the applicant or certificate holder has the duty to provide available evidence relative to the above considerations. The superintendent of public instruction has the right to gather and present additional evidence which may corroborate or negate that provided by the applicant or certificate holder.

(3) No behavioral problem which endangers the educational welfare or personal safety of students, teachers, or other colleagues within the educational setting.

(4) No practice within the state of Washington within the previous five school years with an expired, lapsed, surrendered, or revoked certificate in a professional position for which certification is required under the rules of the state board of education.

WAC 180-75-082 Good moral character and personal fitness—Necessary supporting evidence by applicants. All applicants for certification shall submit the following:

(1) An affidavit from the applicant indicating that he or she has not been convicted of any crime or a complete disclosure of all arrests and subsequent dispositions of such arrests. In the event of a conviction for any arrest, the applicant shall state reasons why such conviction does not reflect adversely on the requirement to possess good moral character and be personally fit.

(2) An affidavit from the applicant that he or she has no history of serious behavioral problems or a complete disclosure of the nature and status of all such problems, including the names and addresses of health practitioners who have treated the applicant within the past ten years and an executed consent form permitting the superintendent of public instruction to contact and consult with such health practitioners and for such health practitioners to fully disclose medical information related to such behavioral problems.

(3) An affidavit from the dean of the college or school of education or one or more officials designated by such dean, or, if none, by the college or university president, where the applicant completed his or her approved preparation program, that indicates that a designated college or university official has contacted several faculty members who personally know or knew the applicant and has no knowledge that the applicant has been convicted of any crime and has no knowledge that the applicant has a history of any serious behavioral problems or a statement from such affiant of the reasons why it is not possible to make such an affidavit.

(4) Provided, that, if the affidavit described in subsection (3) of this section is impossible or impractical to obtain, the applicant shall submit to the superintendent of public instruction the following:

(a) A statement as to why it is impossible or impractical to secure the affidavit required by subsection (3) of this section;

(b) A complete employment history, including the names, addresses, and phone numbers of the immediate supervisor of such applicant when an employee; and

(c) The names, addresses, and phone numbers of three character references who are not related to the applicant.

(5) If the applicant holds or has held a professional certificate in any other state, such applicant shall prepare one of the following affidavits for each such state:

(a) An affidavit that such certificate has not been suspended, surrendered, or revoked. Such affidavit shall be forwarded to the licensing agency in such state with a request that such affidavit be verified and forwarded directly to the superintendent of public instruction.

(b) An affidavit which shall fully disclose the reasons for the suspension, surrender, or revocation of the certificate. Such affidavit shall be submitted directly to the superintendent of public instruction.

WAC 180-75-083 Good moral character and personal fitness—Continuing requirement. The good moral character and personal fitness requirement of applicants for certification under the laws of the state of Washington is a continuing requirement for holding a professional educational certificate under regulations of the state board of education.

WAC 180-75-085 General requirements—Teachers, administrators, educational staff associates. The following requirements are to be met by candidates for certification as teachers, administrators, or educational staff associates:

(1) Age. No person who is less than eighteen years of age shall receive a certificate to serve in the public or nonpublic schools of Washington state.

(2) Character. Applicants for certificates in Washington state who are not holders of a valid Washington state teacher's, administrator's, educational staff associate's, or vocational certificate must give evidence of good moral character and personal fitness as specified in WAC 180-75-082 and must complete a record check through the Washington state patrol criminal identification system and through the Federal Bureau of Investigation at the applicant's expense as required by RCW 28A.410.010; such record check shall include a fingerprint check using a Washington state patrol approved fingerprint card: *Provided*, That the superintendent of public instruction may waive the record

check for an applicant who has had a record check within the two years prior to application.

(3) Academic. A candidate for certification shall have successfully completed a state approved college/university professional preparation program and hold appropriate degrees, licenses, and additional course work as prescribed in chapter 180-79 WAC or have qualified under WAC 180-79-245: *Provided*, That this section shall not apply to vocational, limited, internship, or instructional specialists certificates.

WAC 180-75-087 Reinstatement of certificates. Only a continuing certificate may be reinstated. A holder of a lapsed, surrendered, or revoked continuing professional certificate at the time of application for reinstatement of such certificate must submit the following:

(1) Character evidence as required by WAC 180-75-085(2) for candidates for certification.

(2) In accordance with RCW 28A.410.110, a revoked certificate may not be reinstated within one calendar year from the date of revocation.

(3) *Provided*, That no certificate may be reinstated if more than five calendar years has passed since the date of lapsing, surrender, or revocation; however, such applicants may apply pursuant to WAC 180-75-061 for a new certificate under standards in effect at the time of application.

* * *

Supreme Court, U.S.
FILED
MAR 27 2002
CLERK

No. 01-679

IN THE

Supreme Court of the United States

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
Petitioners,

v.

JOHN DOE,
Respondent.

On Writ of Certiorari
to the Supreme Court of Washington

BRIEF FOR RESPONDENT

DREW S. DAYS, III
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QUESTION PRESENTED

The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g(b)(2), provides, *inter alia*, that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records [other than as permitted elsewhere in the statute], unless * * * there is written consent" from the parents or adult student "specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released" to the parent. 20 U.S.C. § 1232g(b)(2)(A). The question presented is:

Whether respondent has a cause of action against petitioners for damages under 42 U.S.C. § 1983 to vindicate his right under 20 U.S.C. § 1232g(b) to withhold consent and prevent the unauthorized release of personally identifiable information from his education records.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT	1
A. Statutory Framework	1
B. Factual And Procedural Background	3
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. CONGRESS CREATED A RIGHT UNDER FERPA, 20 U.S.C. § 1232g(b), OF PARENTS TO WITHHOLD CONSENT AND PREVENT RELEASE OF EDUCATION RECORD INFORMATION AND THAT RIGHT IS ENFORCEABLE UNDER 42 U.S.C. § 1983	10
A. Section 1232g(b)(2) Gives Rise To A Federal Right Under *Blessing*	11
B. FERPA's Statutory Structure Confirms That Section 1232g(b)(2) Creates An Enforceable Parental Right	22
C. FERPA's Legislative History Indicates That Congress Intended An Individual Parental Right To Prevent Release Of Education Record Information	27

TABLE OF CONTENTS—Continued

	Page
II. FERPA'S ADMINISTRATIVE SCHEME IS NOT SUFFICIENTLY COMPREHENSIVE TO SUPPLANT RESPONDENT'S SECTION 1983 SUIT	31
A. FERPA's Administrative Scheme Does Not Provide Redress For An Individual Claim	32
B. A Section 1983 Action Is Not Incompatible With FERPA's Administrative Scheme	37
III. PETITIONERS' CHALLENGE TO THE *BLESSING* STANDARD IS WITHOUT MERIT	40
A. A Section 1983 Action Does Not Raise The Same Concerns As Does An Implied Cause Of Action	41
B. Nineteenth Century Common Law Should Not Alter The *Blessing* Analysis	46
CONCLUSION	49

TABLE OF AUTHORITIES

CASES

	Page
Alexander v. *Sandoval*, 532 U.S. 275 (2001)	42, 43
Barnes v. *Gorman*, 257 F.3d 738 (8th Cir. 2001), *cert. granted*, 122 S. Ct. 865 (Jan. 11, 2002) (No. 01-682)	46
Bell v. *New Jersey*, 461 U.S. 773 (1983)	41
Bennett v. *Kentucky Dept. of Ed.*, 470 U.S. 656 (1985)	47
Blessing v. *Freestone*, 520 U.S. 329 (1997)	*passim*
Cannon v. *University of Chicago*, 441 U.S. 677 (1979)	17, 18, 42, 43, 46
City of Canton v. *Harris*, 489 U.S. 378 (1989)	44
City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981)	45
Cort v. *Ash*, 422 U.S. 66 (1975)	43
Davis v. *Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)	39
Doe v. *MacMillan*, 412 U.S. 306 (1973)	29
Edelman v. *Jordan*, 415 U.S. 651 (1974)	43
Ex Parte Young, 209 U.S. 123 (1908)	43
Fay v. *S. Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986)	39
Freeman v. *Oakland Unified Sch. Dist.*, 179 F.3d 846 (9th Cir. 1999)	44
Franklin v. *Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992)	39
Gebser v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)	39, 42, 43
Golden State Transit Corp. v. *Los Angeles*, 493 U.S. 103 (1989)	32, 36, 41
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	45
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977)	20
Livadas v. *Bradshaw*, 512 U.S. 107 (1994)	31

TABLE OF AUTHORITIES—Continued

	Page
Maine v. *Thiboutot*, 448 U.S. 1 (1980)	10, 41
Malley v. *Briggs*, 475 U.S. 335 (1986)	45
Merriken v. *Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973)	30
Middlesex County Sewerage Auth. v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981)	32, 36
Monell v. *New York City Dep't of Social Servs.*, 436 U.S. 658 (1978)	15, 39, 44
Mt. Healthy City Sch. Dist. Bd. Educ. v. *Doyle*, 429 U.S. 274 (1977)	44
Patsy v. *Board of Regents of Florida*, 457 U.S. 496 (1982)	37, 38
Pembaur v. *City of Cincinnati*, 475 U.S. 469 (1986)	44
Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981)	40, 41, 47
Regents of the University of California v. *Doe*, 519 U.S. 425 (1997)	43
Rendell-Baker v. *Kohn*, 457 U.S. 830 (1982)	43
Richardson v. *McKnight*, 521 U.S. 399 (1997)	43
Smith v. *Robinson*, 468 U.S. 992 (1984)	32, 36
Smith v. *Wade*, 461 U.S. 30 (1983)	45
South Dakota v. *Dole*, 483 U.S. 203 (1987)	47
Suter v. *Artist M.*, 503 U.S. 347 (1992)	15, 25, 40
Tarka v. *Franklin*, 891 F.2d 102 (5th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990)	39
United States v. *Miami University*, 91 F. Supp. 2d 1132 (S.D. Ohio 2000) appeal pending, No. 00-3518 (6th Cir.)	18, 38
Wilder v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
Will v. *Michigan Dept. of State Police*, 491 U.S. 58 (1989)	42, 43
Wright v. *Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987)	passim
CONSTITUTION	
U.S. Const. Art. I, § 8, Cl. 1 (Spending Clause)	40, 46, 47, 48
STATUTES	
Act of October 20, 1994, Pub. L. No. 103-382, §§ 212(a)(2), (b)(2), 108 Stat. 3913	22
Act of Oct. 26, 2001, Pub. L. No. 107-56, § 507, 115 Stat. 367	30
Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d	19, 43, 48
§ 2000d-7(a)	46
Education Amendments of 1972, Tit. IX, 20 U.S.C. § 1681	*passim*
1682(2)	39
Rehabilitaiton Act of 1973, 29 U.S.C. § 794(a), *et seq.*	46
Social Security Act, Title IV-D, 42 U.S.C. § 651-669b	10
20 U.S.C. § 1092(a)(1)	19
General Education Provisions Act, 20 U.S.C. § 1221, *et seq.*	
20 U.S.C. § 1221	1, 21, 47
20 U.S.C. § 1221(b)(1)	48
20 U.S.C. § 1221(b)(2)	48
20 U.S.C. § 1221(c)(1)	11
20 U.S.C. § 1234 *et seq*	34
20 U.S.C. § 1234(a)	18, 21

TABLE OF AUTHORITIES—Continued

	Page
20 U.S.C. §§ 1234a-1234g	21
20 U.S.C. § 1234c-1234f	18
20 U.S.C. § 1234c(a)	21
20 U.S.C. § 1234e(a)	35
20 U.S.C. § 1234f(a)	34
20 U.S.C. § 1234f(b)	34
20 U.S.C. § 1234g	38
20 U.S.C. § 1234i	11
Family Educational Rights and Privacy Act of 1974,	
20 U.S.C. § 1232g	1, 11, 19, 25, 34
20 U.S.C. § 1232g(a)	1, 25, 26
20 U.S.C. § 1232g(a)(1)(A)	2, 26
20 U.S.C. § 1232g(a)(1)(B)	26
20 U.S.C. § 1232g(a)(2)	2, 16, 26
20 U.S.C. § 1232g(a)(3)	11
20 U.S.C. § 1232g(a)(5)	2
20 U.S.C. § 1232g(a)(5)(A)	23
20 U.S.C. § 1232g(a)(5)(B)	23
20 U.S.C. § 1232g(b)	*passim*
20 U.S.C. § 1232g(b)(1)	*passim*
20 U.S.C. § 1232g(b)(1)(A)-(J)	8, 12
20 U.S.C. § 1232g(b)(1)(B)	24
20 U.S.C. § 1232g(b)(1)(C)	24
20 U.S.C. § 1232g(b)(1)(D)	24
20 U.S.C. § 1232g(b)(1)(E)	24
20 U.S.C. § 1232g(b)(1)(F)	24
20 U.S.C. § 1232g(b)(1)(J)	24
20 U.S.C. § 1232g(b)(2)	*passim*
20 U.S.C. § 1232g(b)(2)(A)	*passim*
20 U.S.C. § 1232g(b)(2)(B)	13
20 U.S.C. § 1232g(d)	1, 26
20 U.S.C. § 1232g(e)	1

TABLE OF AUTHORITIES—Continued

	Page
20 U.S.C. § 1232g(f)	2, 18, 20, 21, 35
20 U.S.C. § 1232g(g)	3, 21, 34, 35
20 U.S.C. § 1232g(j)(3)	30
20 U.S.C. § 1232i	1, 24
20 U.S.C. § 1232i(a)	24, 25
20 U.S.C. § 2304	25
20 U.S.C. § 9274	25
42 U.S.C. § 1983	*passim*
REGULATIONS AND REGULATORY MATERIALS	
34 C.F.R. § 81.2	34
34 C.F.R. § 81.7	34
34 C.F.R. § 99.1-99.67	1
34 C.F.R. § 99.3	23
34 C.F.R. § 99.7(a)(2)(iii)	26
34 C.F.R. § 99.60(b)(1)	9, 35
34 C.F.R. § 99.60(b)(2)	9, 35
34 C.F.R. § 99.63	9, 33
34 C.F.R. § 99.63-99.66	36
34 C.F.R. § 99.64(a)	33
34 C.F.R. § 99.64(b)	33
34 C.F.R. § 99.65	9
34 C.F.R. § 99.65(a)	33
34 C.F.R. § 99.65(b)	33
34 C.F.R. § 99.66(a)	33
34 C.F.R. § 99.66(b)	9, 33
34 C.F.R. § 99.66(c)	21, 33
34 C.F.R. § 99.67(a)	21, 34
34 C.F.R. § 99.67(a)(2)	35
34 C.F.R. § 99.67(b)	9, 33
52 Fed. Reg. 22, 252 (1987)	35
Wash. Admin. Code 180-75-082(3) (1989)	1

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS — Page

120 Cong. Rec. 9370 (1974) 27
120 Cong. Rec. 9634-9635 (1974) 31
120 Cong. Rec. 9635 (1974) 29
120 Cong. Rec. 9928-9930 (1974) 28
120 Cong. Rec. 9930 (1974) 31
120 Cong. Rec. 9985-9986 (1974) 31
120 Cong. Rec. 9985-9987 (1974) 28
120 Cong. Rec. 10,142-10,144 (1974) 28
120 Cong. Rec. 13,951 (1974) 27
120 Cong. Rec. 13,951-13,953 (1974) 31
120 Cong. Rec. 13,952 (1974) 27
120 Cong. Rec. 13,953-13,954 (1974) 29
120 Cong. Rec. 13,954 (1974) 28
120 Cong. Rec. 14,580 (1974) 28, 29, 31
120 Cong. Rec. 14,581 (1974) 27, 30
120 Cong. Rec. 17,719 (1974) 28
120 Cong. Rec. 36,530 (1974) 30
120 Cong. Rec. 36,532 (1974) 38
120 Cong. Rec. 36,534 (1974) 36
120 Cong. Rec. 39,863 (1974) 28, 30
121 Cong. Rec. 13,990-13,992 (1975) 28
121 Cong. Rec. 13,991 (1975) 28

OTHER AUTHORITIES

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TABLE OF AUTHORITIES—Continued

Page

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2 Francis Wharton, *A Commentary on the Law of Contracts* (1882) 48

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (FERPA) (2000), as amended by Pub. L. No. 107-56, § 507,115 Stat. 367 (2001), is reproduced in the appendix to this brief at 2a-15a. Relevant provisions of certain other sections of Title 20 of the United States Code are reproduced in the appendix to this brief as follows: 20 U.S.C. § 1221 (App., *infra*, 1a); 20 U.S.C. § 1232i (App., *infra*, 16a); 20 U.S.C. §§ 1234 to 1234g (App., *infra*, 17a-26a). In addition, Section 1983 of Title 42 of the United States Code is reproduced at Pet. Br. 1a; the current FERPA regulations (34 C.F.R. §§ 99.1 - 99.67) are reproduced at Pet. Br. 17a-45a; and portions of the Washington Administrative Code (1997), are reproduced at Pet. Br. 46a-52a.

STATEMENT

A. *Statutory Framework*

Congress enacted the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g, to require recipients of federal educational program funds to impose certain limits on the release of personally identifiable information from students' education records. Subsection (a) of FERPA addresses the "inspection and review of education records" by parents,[1] providing, *inter alia*, that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students

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[1] The statutory text uses the term "parents," but a student, like respondent, who attends a postsecondary institution or is 18 years of age or older, is accorded the rights that generally are accorded parents. *See* 20 U.S.C. §§ 1232g(d); 1232g(e). We use the term "parents" to include both parents and students who are accorded parental rights. We also refer, however, on occasion to "adult students" to mean students, like respondent, who attend postsecondary institutions or are 18 years of age or older.

* * * the right to inspect and review the education records of their children." 20 U.S.C. § 1232g(a)(1)(A); *see also* 20 U.S.C. § 1232g(a)(2).

Subsection (b) of FERPA—the subsection at issue in this case—limits the transferability of education records without parental consent. Paragraph (1) of subsection (b) provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in [20 U.S.C. § 1232g(a)(5)]) of students without the written consent of their parents to any individual, agency, or organization, other than to" a long list of officials, pursuant to statutorily specified circumstances. 20 U.S.C. § 1232g(b)(1).

Paragraph (2) of subsection (b) details the right of parents, in certain circumstances, to withhold consent and prevent the release of education records. It provides, in relevant part:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information, in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—
>
> (A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents * * *.

20 U.S.C. § 1232g(b)(2)(A).

FERPA also authorizes the Secretary of Education to enforce FERPA and deal with statutory violations (20 U.S.C. § 1232g(f)), and directs the creation of an office and review board to investigate, process, review, and adjudicate statutory violations and complaints (20 U.S.C. § 1232g(g)). Other FERPA provisions address certain other releases of education record information and recordkeeping requirements.

B. *Factual And Procedural Background.*

1. Respondent, John Doe, is a former undergraduate student in the teacher education program of the school of education at petitioner Gonzaga University. Petitioner Gonzaga University is a private university in Spokane, Washington, which, as a recipient of funds under applicable federal educational programs, is subject to the requirements of FERPA. Pet. App. 2a; Pet. 3; *see* Br. in Opp. 11 n.4. Petitioner Roberta League is the teacher certification specialist in Gonzaga's department of education. Pet. App. 2a.

In March 1994, respondent received a telephone call asking him to report to the dean's office of the school of education. When he met with the dean, respondent was "escorted to a private room and left to read a letter from" the dean explaining that, "in light of allegations of sexual assault," the dean would not give respondent the moral character affidavit required by the State of Washington in support of any teacher certification application he might submit. Pet. App. 6a-7a; *see id.* at 23a. When respondent asked what the allegations were, the dean refused to provide any information, including the identity of the individual who purportedly made the allegations. *Id.* at 7a. When respondent and his parents later asked about their appeal rights, "they were told there were none." *Ibid.*

Ultimately, respondent learned that the dean's decision was based on an investigation conducted by petitioner Roberta League and other department members over the preceding several months. That investigation had begun when League overheard two students talking in October 1993 about an incident that allegedly had occurred approximately one year earlier involving respondent and Jane Doe, a fellow teacher education student. Pet. App. 2a. Respondent and Jane Doe

had a sexually intimate relationship in late 1992. *Ibid.* League overheard one of the students expressing her dissatisfaction with how the school handled date rape complaints and that student told her friend that Jane Doe had claimed that having sex with respondent caused her physical pain. The student "was angry that no one from Gonzaga had bothered to find out what had happened." *Ibid.*

League recognized respondent's name as that of a student in the school of education and conveyed what she had overheard to Dr. Susan Kyle, the director of field experience for student teachers. The two of them launched their own investigation of the matter which eventually involved 19 Gonzaga staff members. Pet. App. 3a. At the outset of their investigation, on October 14, 1993, petitioner League and Kyle asked the student whom League had overheard to approach Jane Doe to ask if she would speak with them about her relationship with respondent. *Id.* at 4a. Notwithstanding the fact that the student told the staff members that Jane Doe had denied the rape allegations the preceding year, the student agreed to speak with Jane Doe again. *Id.* at 33a. Jane Doe "became angry and told [the student] that she did not want to make a complaint." On October 28, 1993, Kyle herself met with Jane Doe and discussed the situation, but Jane Doe refused to make a formal statement. *Id.* at 5a. A professor met Jane Doe in the hallway after she left Kyle's office and, according to that professor, Jane Doe was near hysteria and made more allegations about respondent, including that he had threatened her life. *Ibid.*

In October 1993, petitioner League also contacted the Washington State Office of the Superintendent of Public Instruction (OSPI), which regulates teacher education programs. Pet. App. 5a. Petitioner spoke to Adelle Nore, a senior investigator in OSPI, and informed her about the allegations that a student may have engaged in sexual misconduct. *Ibid.* Petitioner and other Gonzaga personnel subsequently spoke with that state official on numerous

occasions and informed her of respondent's identity. *Ibid.* Gonzaga had a practice by which "Gonzaga personnel routinely called OSPI, before a student's application for certification was submitted," to talk about students and to obtain advice. *Id.* at 19a.

In February 1994, the dean of the school of education met with petitioner League and others and concluded that there was sufficient evidence of a serious behavioral problem that would preclude her from signing an affidavit in support of any teacher certification application that might be made by respondent. That conclusion by the dean resulted in the letter she presented to respondent. Pet. App. 6a.

2. In June 1994, respondent brought a civil action in state court against Gonzaga University, alleging defamation, breach of educational contract, and negligence. He later sued petitioner League and other school officials and the cases were consolidated. Pet. App. 8a. Thereafter, respondent amended his complaint to add a claim under 42 U.S.C. § 1983 for violation of 20 U.S.C. § 1232g(b)—the parental (or adult student) consent requirement of FERPA—based on Gonzaga's release, without respondent's consent, of personally identifiable information from his education records, pursuant to petitioners' policy or practice of releasing such information to the OSPI. *See also* Br. in Opp. 6-9 (further describing procedural history that led to amendment of complaint, as well as history of cross-claims and counter-claims).

The case proceeded to trial in March 1997. Pet. App. 9a. Jane Doe, testifying through depositions, explained that some things had happened during her relationship with respondent that made her uncomfortable, but respondent had not sexually assaulted her. *Id.* at 7a. She testified that the student who first talked about the relationship had "really blown things out of proportion," that there were falsehoods in the various declarations of the staff, that the department chairperson "wasn't interested in hearing anything other than what she

already believed," and that she, Jane Doe, had told the dean that Gonzaga personnel were "wrong in their assumptions" about what had happened in her relationship with respondent. *Ibid.*

Respondent also testified about the relationship between him and Jane Doe, explaining that sexual intercourse had occurred but was never forced, and that the declarations by the Gonzaga personnel contained many lies. Pet. App. 7a-8a. He also testified that petitioners destroyed his teaching career. *Id.* at 8a. Respondent's roommates testified that they never heard or observed anything to indicate that Jane Doe was unwilling to engage in sexual intercourse. Two of respondent's former girlfriends testified that he never pressured them to engage in sexual activity. *Id.* at 7a-8a.

The jury returned a verdict in respondent's favor, awarding him damages in the amount of $500,000 for defamation; $100,000 for invasion of privacy; $150,000 for violation of FERPA rights; $300,000 punitive damages for the FERPA violation; $55,000 for breach of educational contract; and $50,000 for negligence. Pet. App. 9a.

3. The Court of Appeals of Washington reversed certain rulings on discovery, evidence, and jury instructions and remanded for a retrial on the defamation claim. Pet. App. 30a-53a. The court ruled that the trial court erred in failing to grant petitioners a directed verdict on all of the remaining claims, including the FERPA claim. *Id.* at 39a-49a. The court held that FERPA does not create a right that individuals can enforce under 42 U.S.C. § 1983 and that, even if it did create such a right, a teacher candidate waives the right by applying for teacher certification. *Id.* at 44a-48a.

4. The Supreme Court of Washington granted respondent's petition for review, Pet. App. 10a, and subsequently affirmed in part and reversed in part, *id.* at 1a-28a. The court remanded the case for reinstatement of the judgment, except on the negligence claim, which it ordered dismissed. *Id.* at 2a.

With regard to the FERPA claim, the court found that "[s]ubstantial evidence supports a determination that Gonzaga had a 'policy or practice' of disclosing personally identifiable information contained in education records—in violation of FERPA." Pet. App. 19a. The court also held that the FERPA provision at issue here creates individual rights that are privately enforceable under Section 1983. *Id.* at 20a-21a. The court ruled that the FERPA provision limiting the release of records without consent met the three-factor test recently articulated by this Court in *Blessing* v. *Freestone*, 520 U.S. 329 (1997). Pet. App. 20a. The court also pointed to rulings by four federal courts of appeals holding that FERPA creates rights privately enforceable under Section 1983. *Id.* at 21a & n.12 (citing cases). The court concluded that there was substantial evidence to support the jury findings that the trial defendants deprived respondent of his federal statutory right under FERPA and were acting under color of state law. *Id.* at 21a-23a. The court also reversed the alternative ruling that respondent had waived his FERPA right, noting that respondent had not yet submitted an application for teacher certification when petitioners disclosed the education record information to the state agency. *Id.* at 22a-23a.

5. On January 11, 2002, the Court granted the petition for a writ of certiorari, limited to the first question presented by the petition. 122 S. Ct. 865.

SUMMARY OF ARGUMENT

I. The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g(b), requires that an educational institution that receives federal educational program funds impose certain limitations on the release of personally identifiable information from student education records. Paragraph (1) of Section 1232g(b) prohibits an educational institution from having a policy or practice of permitting the release of education record information without written parental consent, other than to particular persons expressly

authorized by that provision. 20 U.S.C. § 1232g(b)(1)(A)-(J). Paragraph (2) addresses the circumstances where an educational institution, like petitioner Gonzaga, has a policy or practice of releasing personally identifiable information from education records to persons not authorized under paragraph (1). An institution may not release information "unless" there is prior written consent from the parents (or an adult student like respondent) for release of the particular information at issue, and the institution must provide the parents with a copy of the record intended for release, the reasons for the release, and the identity of the recipient. 20 U.S.C. § 1232g(b)(2)(A). Congress thereby accorded parents a right to withhold consent and prevent the release of education record information under Section 1232g(b)(2)(A).

Petitioners broadly declare that FERPA does not create any right enforceable under 42 U.S.C. § 1983. They do so in error, however, because they treat the statute as an "undifferentiated whole." *Blessing* v. *Freestone*, 520 U.S. 329, 342 (1997). When particularized analysis is given FERPA, it reveals that Congress intended "that the provision in question benefit the plaintiff;" that the right claimed is "not so 'vague and amorphous' that its enforcement would strain judicial competence;" and that the statute "unambiguously impose[s] a binding obligation," that is mandatory rather than precatory. *Id.* at 340-341 (citations omitted). The detailed nature of the consent required evidences Congress' intent that parents be treated in a particular manner to satisfy their need to make an informed decision about whether the requested release would be in the best interests of their child. *See id.* at 343. That the parental consent requirement of paragraph (2) applies only to an educational institution that has a policy or practice of releasing education record information to persons other than those authorized under paragraph (1), does not transform the parental consent requirement into a prohibition against a policy or practice. Rather, that limitation ensures that an educational institution that does not have such a policy or

practice, but inadvertently releases education record information based, for example, on the mistaken belief that the release is authorized under paragraph (1), does not violate FERPA. Moreover, the statutory scheme and legislative history of FERPA provide further evidence of Congress' intent to create a parental right to withhold consent and prevent the release of education record information under Section 1232g(b).

II. FERPA's limited administrative scheme is not sufficiently comprehensive to supplant respondent's Section 1983 action. *See Blessing*, 520 U.S. at 346. The administrative scheme does not afford parents a tribunal, either administrative or judicial, to redress an individual claim. Under the scheme, parents have a right only to file a complaint with the Department of Education's Family Policy Compliance Office (FPCO), 34 C.F.R. § 99.63, and to be informed about the disposition of the complaint. *Id.* at § § 99.65, 99.66(b), 99.67(b). FPCO does not adjudicate individual complaints. *See id.* at. § 99.60(b)(1) and (2). A Section 1983 action to remedy respondent's claim is not incompatible with that administrative scheme.

III. Petitioners' arguments for application of a standard different from the *Blessing* analysis are without merit. Petitioners' arguments confuse a federal right that is enforceable under 42 U.S.C. § 1983, with the creation by a court of an implied cause of action. When a court infers an implied cause of action, that cause of action and the remedies available thereunder are, by definition, indeterminate in scope and may raise separation of powers concerns. Those concerns do not arise here because this case involves an express cause of action under 42 U.S.C. § 1983, which is limited in a variety of ways. Finally, petitioners' argument based on Nineteenth Century contract law is misplaced and does not warrant overruling more than two decades of this

Court's precedent, holding that an individual may sue under Section 1983 to enforce federal rights conferred by Spending Clause legislation.

ARGUMENT

I. CONGRESS CREATED A RIGHT UNDER FERPA, 20 U.S.C. § 1232g(b), OF PARENTS TO WITHHOLD CONSENT AND PREVENT RELEASE OF EDUCATION RECORD INFORMATION AND THAT RIGHT IS ENFORCEABLE UNDER 42 U.S.C. § 1983

Section 1983 imposes liability on "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage of any State * * * subjects, or causes to be subjected," any person within the United States "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws * * *." 42 U.S.C. § 1983. It specifies that every such person shall be "liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *." 42 U.S.C. § 1983. Section 1983 thereby safeguards the rights that are conferred on a person by the Constitution and other federal statutes. *Maine* v. *Thiboutot*, 448 U.S. 1, 4 (1980). Whether another federal statute establishes an individual right that is enforceable under Section 1983 is a question that this Court has addressed in the context of numerous statutes over the past several years.

Most recently, in *Blessing* v. *Freestone*, 520 U.S. 329 (1997), the Court addressed the question whether individuals may sue under Section 1983 for violations of Title IV-D of the Social Security Act, 42 U.S.C. § § 651-669b. The Court reaffirmed its three-factor inquiry to determine whether a particular statutory provision gives rise to a federal right enforceable under Section 1983: (1) whether Congress intended "that the provision in question benefit the plaintiff;" (2) whether the right claimed to be protected by the statutory provision is "not so 'vague and amorphous' that its enforcement would strain judicial competence;" and (3) whether the statute "unambiguously impose[s] a binding obligation" such that the provision is "couched in mandatory rather than precatory terms." *Blessing*, 520 U.S. at 340-341 (citing *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 430-432 (1987), and *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 510-511 (1990)).

Examination of the text, structure, and history of FERPA, 20 U.S.C. § 1232g(b), under the *Blessing* analysis, demonstrates that Congress intended to create an individualized right of parents to withhold consent and prevent the unauthorized release of education record information by an educational institution like petitioner Gonzaga that has a policy or practice of releasing such information.[2]

A. Section 1232g(b)(2) Gives Rise To A Federal Right Under *Blessing*

1. Petitioners broadly declare that the Family and Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g, does not create any rights enforceable under Section 1983. Pet. Br. 21-23; 32-35. Their argument is rooted in general assertions that "FERPA's operative provisions" are not "phrased in terms of individual rights" (*id.* at 21), and that "FERPA's language and structure do not confer individual rights" (*ibid*). Petitioners do not distinguish adequately, however, between the various provisions of FERPA. Instead, they treat the statute as an "undifferentiated whole," contrary to the particularized analysis mandated by *Blessing*. 520 U.S. at 342. In *Blessing*, the Court held that it

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[2] We use the term "educational institution" to refer to an "educational agency or institution" as that term is defined in FERPA to mean "any public or private agency or institution which is the recipient of funds under any applicable program." 20 U.S.C. § 1232g(a)(3). Applicable programs include most of the programs for which the Secretary or the Department of Education has administrative responsibility. *See* 20 U.S.C. §§ 1221(c)(1), 1234i.

is error to use a "blanket approach" to determine whether a general statutory scheme creates rights enforceable under Section 1983. *Id.* at 344. Rather, consideration must be given to the specific claim and the particular statutory provision on which it rests. *Id.* at 342-343.

Petitioners acknowledge (Br. 22) that respondent's Section 1983 cause of action rests on an allegation of a violation of respondent's rights under Section 1232g(b), but they nowhere analyze the complete statutory text to determine whether it creates the individual right respondent seeks to enforce. The quotations of the statutory text by petitioners and their *amici* omit the relevant language in paragraph (2) of Section 1232g(b) that specifically grants parents (and adult students) the right to withhold consent and prevent the unauthorized release of education record information by an educational institution that has a policy or practice of releasing, or providing access to, such information. *See* Pet. Br. 3-5, 21; U.S. Br. at 2. But paragraphs (1) and (2) of Section 1232g(b) are not the same.

Paragraph (1) of Section 1232g(b), which is the sole focus of petitioners' statutory analysis, provides, in relevant part, that federal educational program funds shall not be available to any educational institution "which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information * * *) of students without the written consent of their parents to any individual, agency, or organization, other than to" those specifically listed in paragraph (1), which includes a host of state, local, and federal educational and law enforcement officials. *See* 20 U.S.C. § 1232g(b)(1)(A)-(J). Section 1232g(b)(1) means that an educational institution may have a policy or practice of releasing education records and personally identifiable information contained therein, without parental consent, to such specifically authorized persons and entities, but not to others.

Paragraph 2 of Section 1232g(b) begins with language similar, but not identical, to paragraph (1), and continues after that language with a critical subparagraph that is introduced with the directive "unless." Section 1232g(b)(2) provides, in relevant part:

> [n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—
>
> (A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents * * *.

20 U.S.C. § 1232g(b)(2)(A).

Congress clearly said something quite different in paragraph (2) than it did in paragraph (1). Paragraph (2) says that an educational institution that has a policy or practice of releasing, or allowing access to, personally identifiable information in education records to persons other than those authorized in paragraph (1), must obtain the consent of parents in the particular manner described in subparagraph (A) or meet the standard set forth in (B) (regarding judicial orders). The institution may not release such information "unless" one of the standards is met.

2. Petitioners' abbreviated consideration of the statutory text leads them repeatedly to claim that "the statute merely conditions the availability of federal funds on an institution not having specified policies or practices" (Pet. Br. 21; *see also id.* at 2, 3, 9, 22), and that the statute reflects congressional concern only "with systemwide performance" (*id.* at 22). *See also* U.S. Br. 4-5, 13-16. Thus, they argue

that, under FERPA, "particular individuals are not accorded an entitlement to be treated in any particular manner." Pet. Br. 22.

The plain language of Section 1232g(b)(2) belies those arguments. It makes clear that Congress focused directly on parents and afforded them (and adult students) an individualized right to withhold consent and prevent the unauthorized release of personally identifiable information in education records by an educational institution that has a policy or practice of releasing, or providing access to, such information. 20 U.S.C. § 1232g(b)(2). Moreover, Congress detailed the individualized manner in which the right is to be accorded parents, 20 U.S.C. § 1232g(b)(2)(A), reflecting Congress' intent to ensure that "the needs of [a] particular person have been satisfied." *Blessing*, 520 U.S. at 343. Also, Section 1232g(b)(2) is explicitly "focus[ed] on the individual"—the parents. *Wright*, 479 U.S. at 430; *see also Wilder*, 496 U.S. at 510.

Section 1232g(b)(2) does not prohibit an educational institution from having a policy or practice. Nor does it require that any educational institution have a policy or practice. Rather, Section 1232g(b)(2) addresses the circumstance where an educational institution has a policy or practice of releasing personally identifiable information from education records to persons not authorized under Section 1232g(b)(1) and, by virtue of Section 1232g(b)(1), cannot do so without parental consent. Section 1232g(b)(2) conditions such an institution's authority to make such releases, not on a policy or practice of the institution in seeking or obtaining parental consent, but on there being, in fact, individualized, prior written parental consent. It requires that an educational institution treat a particular individual (parents) in a particular manner (providing them with copies of records, reasons for a release, and identity of recipient) and mandates that it obtain

prior written consent for each otherwise unauthorized release. 20 U.S.C. § 1232g(b)(2)(A).

That the parental consent requirement applies only to an educational institution that has a policy or practice of releasing education record information to persons other than those authorized under Section 1232g(b)(1) does not transform the parental consent requirement into a prohibition against a practice or policy, as petitioners contend (Pet. Br. 21-22). Rather, Congress' limited application of the written parental consent requirement protects educational institutions that do not intend to allow release of education record information to anyone other than those authorized under Section 1232g(b)(1). That limitation ensures that an educational institution that does not have such a policy or practice, but inadvertently releases education record information based, for example, on the mistaken belief that the release is authorized under Section 1232g(b)(1), does not violate FERPA. *Cf. Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658, 690-695 (1978). If, however, an educational agency does have a policy or practice of releasing education record information beyond those authorized under Section 1232g(b)(1) (as petitioners did, *see* Pet. App. 19a), it is charged with complying with the written parental consent requirement of Section 1232g(b)(2)(A).

3. Congress' intent to accord individual parents (and adult students) an entitlement to be treated in a particular manner under Section 1232g(b)(2) is evident from the detailed nature of the parental consent required. *Cf. Blessing*, 520 U.S. at 342-344. Like the statute before the Court in *Wilder*, Section 1232g(b)(2) "set[s] forth in some detail the factors to be considered." *Suter* v. *Artist M.*, 503 U.S. 347, 359 (1992) (describing *Wilder* 496 U.S. at 519 n.17). By specifying the information an educational institution must provide to parents from whom they seek consent for an otherwise unauthorized release of their children's education records, Congress

demonstrated its intent to address "whether the needs of [a] particular person have been satisfied." *Blessing*, 520 U.S. at 343. The detailed nature of the consent requirement is designed to satisfy the needs of parents to make a meaningful judgment about whether permitting a particular release of education record information is in their child's best interests.

For example, Congress' requirement that the records to be released be specifically identified and a copy given to the parents is aimed at the need of parents to understand the exact nature of the information at issue. Disclosure of the particular record provides the parents with actual knowledge of what information will be released if they grant consent, rather than forcing the parents to surmise based on the title or description of the record. Such disclosure may prove significant. For example, actual review of a document entitled "health and fitness record," may inform a parent that the record includes information he did not realize would be there, *e.g.*, psychological information, or information about physical or sexual development, or information about IQ testing. Disclosure to a parent, therefore, allows the parent to make an informed decision about whether consenting to release of a record based on its actual contents is in the best interests of their child. It is the parents, not the funding agency or the educational institution, to whom Congress granted the right to make that decision.

The instant case illustrates how Congress intended to benefit individual parents (and adult students) and how the detailed nature of the consent requirement addresses the needs of such individuals. If petitioners had provided respondent with a copy of the education record information it sought to release, the identity of the intended recipient of the information, and the reason for the release, respondent would have been able to request a hearing and correct the records or, at the very least, insert an explanation into the records, under 20 U.S.C. § 1232g(a)(2). Petitioners' request for

respondent's consent would have been the first opportunity for respondent to explain the situation to petitioners—an explanation petitioners may well have found credible. If respondent was not satisfied with any correction or explanation that he was allowed to insert, however, he could then have decided to prevent the release of the information by refusing his consent. Such a refusal would have had serious consequences for him, of course, because it likely would have meant that any application for a teacher certification that he might submit to the State would not have been approved. But, by refusing consent to the release of the information, respondent would have been able to prevent the added injury caused him by petitioners' release of the false and defamatory claim that he had been accused of sexual assault.

In sum, analysis of the full text of Section 1232g(b) demonstrates that respondent's case meets the first prong of the *Blessing* standard because Congress intended that the parental consent requirement benefit individual parents, their families and children. 520 U.S. at 340. Indeed, even absent any detailed analysis of Section 1232g(b)(2) the United States views the question whether Congress intended to benefit the putative plaintiff to be "a close one." U.S. Br. 9. As demonstrated above, that question is not a close one after analysis of the full statutory text.

4. The fact that Section 1232g(b)(2) is phrased as a prohibition on making educational program funds available to an educational institution unless it abides by the statutory requirements, does not, as the United States suggests, alter the result in this case. *See* U.S. Br. 11-12. The passage in *Cannon* v. *University of Chicago*, 441 U.S. 677, 690-691 (1979), on which the United States relies, does not compare the language of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, with a law that was structured "exactly" like FERPA's parental consent requirement. *See* U.S. Br. 12. Because the United States does not address the

text of Section 1232g(b)(2)(A), it fails to appreciate that provision's unmistakable focus on the benefited individuals. In contrast, the *Cannon* Court compared Title IX with laws "enacted for the general public," or written "simply as a ban on discriminatory conduct" by federal recipients, or "as a prohibition against the disbursement of public funds to educational institutions engaging in discriminatory practices." *Cannon*, 441 U.S. at 690-693. That is not how Congress structured the parental consent requirement of FERPA. Congress structured Section 1232g(b)(2)(A) to address the privacy interests of particular individuals—parents (and adult students)—not a right of the general public. By using the condition "unless" in Section 1232g(b)(2)(A), Congress placed the authority in the hands of individual parents, in certain circumstances, to determine whether education record information can be released by educational institutions.

Furthermore, the phrasing of Section 1232g(b)(2) does not alter the fact that, like other funding statutes, Congress imposed a duty of compliance on fund recipients. Congress' direction to the funding agency, that no funds shall be made available to educational institutions who engage in certain conduct, does not impose a primary duty on the funding agency to bar funding if a provision of the statute is violated, or a duty that removes responsibility for compliance from the educational institution. The statutory phrasing must be read in the context of other provisions of FERPA that do not allow the agency to terminate funding for a violation of FERPA unless the violator has been given an opportunity to comply voluntarily. *See* 20 U.S.C. § 1232g(f). In addition, the Secretary is authorized under the statutory scheme to seek compliance by an educational institution with the requirements of the law through any other means authorized by law, including a cease and desist order or a federal court action. *See* 20 U.S.C. §§ 1234(a), 1234c-1234f; *e.g.*, *United States* v. *Miami University*, 91 F. Supp. 2d 1132, 1134 (S.D. Ohio 2000), appeal pending, No. 00-3518 (6th Cir.) (United States

sued university to compel compliance with FERPA and cease disclosures of personally identifiable information without consent). Moreover, Congress has elsewhere made clear that it views FERPA, 20 U.S.C. § 1232g, as imposing duties on, and requiring certain conduct on the part of, educational institutions. *See* 20 U.S.C. § 1092(a)(1) (providing that certain educational institutions "shall, on an annual basis, provide to all enrolled students a list of the information that is required to be provided by institutions to students [regarding financial aid] and section 1232g of [Title 20]"). Finally, the rights-creating language in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, on which the United States focuses, has not been present or required in other Section 1983 cases. *See*, *e.g.*, *Wright*, 479 U.S. at 420 (describing the Brooke amendment); *Wilder* 496 U.S. at 502-503 (describing the Boren amendment).[3]

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[3] The United States is mistaken in contending that, unlike in other Section 1983 cases, respondent did not sue "to obtain the benefit or service that the funding statutes support—namely, education." U.S. Br. 12-13. Petitioners' unauthorized release of respondent's false and defamatory education record information, in violation of the parental consent requirement, precluded respondent from pursuing the teaching career to which he had devoted his training and education. FERPA generally reflects the fact that the privacy of education records is central to a student's ability to participate meaningfully in and benefit from an education. Without assurances of privacy, students and their families may well not provide educational institutions with certain information that is critical to the pedagogical enterprise, including, for example, information about medication, psychological issues, family and financial problems, that teachers or institutions need to know in order to adapt education programs to the needs of their particular students. In any event, the antidiscrimination statutes, Title VI and Title IX, apply to any recipient of federal financial assistance, regardless of whether federal funds are provided to comply with the statute's terms, yet those statutes have been found to support implication of a private cause of action—a broader ruling than one recognizing a right enforceable under Section 1983. *See* pp. 43-46, *infra*.

5. Respondent's claim for violation of his right under 20 U.S.C. § 1232g(b)(2)(A) to withhold consent and prevent the unauthorized release by petitioners of his education record information also meets the second and third prongs of the *Blessing* standard. *See* U.S. Br. 9 n.4 (agreeing that the second and third prongs are satisfied here). The right granted parents under Section 1232g(b) is not "so 'vague and amorphous' that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-341. Congress crafted the provision regarding parental consent in a particularly clear fashion. Moreover, whether an educational institution has a policy or practice of releasing personally identifiable information from education records, and whether it released such information without prior written parental consent, are determinations that are readily susceptible to judicial review. *See e.g., International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) (proof of pattern and practice in complex area of employment discrimination).

Petitioners are mistaken in suggesting (Br. 24, 33) that FERPA imposes on educational institutions a duty of only substantial compliance akin to the "substantial compliance" standard in one of the statutory provisions at issue in *Blessing*, which quantified the level of compliance for various requirements in percentage terms. *See* 520 U.S. at 335. No "substantial" language is found in the FERPA provision they cite. 20 U.S.C. § 1232g(f) (*see* Pet. Br. 33). That provision states that "the Secretary shall take appropriate actions to enforce this section and to deal with violations of the section, in accordance with this chapter." Section 1232g(f) further specifies that termination of assistance "may be taken only if the Secretary finds there has been a failure to comply with this section and he has determined that compliance cannot be secured by voluntary means." Nothing in that section suggests the Secretary's finding of "failure to comply" is limited by a "substantial compliance" standard. Nor is there a suggestion that Congress intended to preclude the Secretary

from taking "appropriate actions to enforce" FERPA absent a substantial compliance standard. Moreover, the neighboring FERPA provision that authorizes the Secretary to designate an office and review board, specifies that they are "for the purpose of investigating, processing, reviewing, and adjudicating violations" of FERPA. 20 U.S.C. § 1232g(g). There is nothing in the statute that limits FERPA violations to some unspecified "substantial [non]compliance" standard, as petitioners imply.

Petitioner's reference to "substantial compliance" relies not on FERPA, but on 20 U.S.C. § 1234c(a), which is part of the General Education Provisions Act (GEPA), 20 U.S.C. § 1221 *et seq*. (Chapter 31 of Title 20), and is referenced in 20 U.S.C. § 1232g(f). Part D of GEPA is an omnibus part, directing the Secretary to establish an office of administrative law judges to conduct hearings, and sets forth procedures for certain actions by the Secretary against fund recipients, including the recovery of funds, withholding of payments, compelling compliance through cease and desist orders, and entering into formal compliance agreements. 20 U.S.C. §§ 1234(a), 1234a-1234g. It provides that the Secretary may take such actions against recipients "[w]henever the Secretary has reason to believe that any recipient of funds under any applicable program is failing to comply substantially with any requirement of law applicable to such funds." 20 U.S.C. § 1234c(a).

Section 1234c(a) does not, however, apply to the FERPA enforcement scheme established by the Secretary, which is administered by the Family Policy Compliance Office (FPCO). Section 1234c(a) applies only after FPCO has found that an educational institution has not complied with FERPA, and the institution has failed to comply with FPCO's directive of the specific steps the institution must take to come into compliance. 34 C.F.R. §§ 99.66(c), 99.67(a) (providing that, if recipient fails to comply within time period set by FPCO, the Secretary may, "in accordance with part E [sic]" of

GEPA, withhold payments, issue a complaint to compel compliance, or terminate eligibility to receive funding). *See also* Pub. L. No. 103-382 § 212(a)(2), (b)(2), 108 Stat. 3913 (1994) (redesignating Part E of GEPA as Part D). According to the United States, "the Secretary has not found it necessary to resort to more formal enforcement measures," and has relied exclusively on the FPCO scheme, except in one instance. U.S. Br. 26 n. 15.

Section 1232g(b) also "unambiguously impose[s] a binding obligation" on recipients of federal educational program funds, as required under the third and final prong of *Blessing*, 520 U.S. at 341. Section 1232g(b)(2) uses the term "unless" which is mandatory. *See id.* at 341 (citing *Wilder*, 496 U.S. at 510-511). Congress unequivocally imposed a duty on an educational institution that has a policy or practice of releasing education record information to persons other than those authorized in Section 1232g(b)(1), to obtain written parental consent, in accordance with the requirements of Section 1232g(b)(2)(A), before releasing such information. Petitioners' contrary interpretation of FERPA, in effect, erases the individual parental consent requirement, Section 1232g(b)(2)(A), from the statute, and reads Section 1232g(b) as if it contained no paragraph (2).

B. FERPA's Statutory Structure Confirms That Section 1232g(b)(2) Creates An Enforceable Parental Right

1. The most significant structural evidence of Congress' intent with respect to Section 1232g(b) is found in the "directory information" provision of FERPA. Both paragraphs (1) and (2) of Section 1232g(b) exempt "directory information" from the restrictions on releases of education record information. 20 U.S.C. §§ 1232g(b)(1), 1232g(b)(2). "Directory information" is defined by FERPA to mean certain basic information about students, including "the student's name, address, telephone listing, date and place of birth,

major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student." 20 U.S.C. § 1232g(a)(5)(A). Directory information is information "that would not generally be considered harmful or an invasion of privacy if disclosed." 34 C.F.R. § 99.3. Congress provided that any educational institution that makes directory information public "shall give public notice of the categories of information which it has designated as such information with respect to each student * * * and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent." 20 U.S.C. § 1232g(a)(5)(B).

Congress thereby provided parents, through the directory information notice requirement, the ability to control release of education record information at a general level when the information is not of a particularly private nature. When the information to be released is more private, however, and may be considered harmful or an invasion of privacy if disclosed, Congress afforded parents, through the written parental consent requirement of Section 1232g(b)(2)(A), a correspondingly more specific right of control. That right includes being informed of the particular record information that is intended to be released, the reason for the release, and the intended recipient, and being afforded the right to withhold consent and prevent the release of that particular record information.

2. Comparison of the parental consent requirement of Section 1232g(b)(2)(A) with other release provisions in FERPA also confirms that Congress intended in that section to create an individual parental right to withhold consent and prevent the unauthorized release of education records. When

Congress specified in Section 1232g(b)(1) the numerous releases of education record information that do not require parental consent, it placed certain conditions that address parental privacy interest on several categories. See 20 U.S.C. § 1232g(b)(1)(B), (C), (E), (F), (J). Those conditions vary, but all fall short of creating an individualized parental right to prevent release of education record information by withholding consent. In each instance, the education record information may be released over the objection of the parent. For example, under Section 1232g(b)(1)(B), when an educational institution plans on releasing a student's education records to another school that the child plans to attend, the educational institution must provide parents with notice of the release, a copy of the records, and "an opportunity for a hearing to challenge the content of the record." 20 U.S.C. § 1232g(b)(1)(B). Congress did not require that the school get consent from the parents and, therefore, parents do not have an ultimate right to prevent such a release. The different approaches Congress chose to take with regard to various recipients who are authorized to receive education records without parental consent make clear that Congress knew how to impose a less individualized condition when it deemed that appropriate.

3. Congress' intent to create an individual parental right to withhold consent and prevent release of education record information is also consistent with Section 1232i of Title 20. In that section, entitled "[l]imitations on withholding of Federal assistance," Congress ensured that an educational institution's federal funding would not be imperiled because of its honoring a parent's right to prevent release of education record information under Section 1232g(b)(2)(A). Section 1232i(a) provides, in relevant part, that "[e]xcept as provided in section 1232g(b)(1)(D) of this Title" (regarding student financial aid), the refusal of an educational institution "to provide personally identifiable data on students or their families, as part of any applicable program, to any Federal

office, agency, department, or other third party, on the grounds that it constitutes a violation of the right to privacy and confidentiality of students or their parents, shall not constitute sufficient grounds for the suspension or termination of Federal assistance," or imperil funding in subsequent years. 20 U.S.C. § 1232i(a). Congress thereby reaffirmed the significance of the right of parents to maintain the privacy of their children's education records and the importance of the obligation of an educational institution to honor that right. *Cf.* 20 U.S.C. § 2304 (providing that nothing in the chapter on vocational and technical education "shall be construed to supersede the privacy protections afforded parents and students under section 1232g"); 20 U.S.C. § 9274 (same regarding Workforce Investment Act of 1998).

4. Petitioners purport to analyze "the statutory provisions in detail, in light of the entire legislative enactment," (Pet. Br. 12 (quoting *Suter*, 503 U.S. at 357); *see also id.* at 22), but they do not examine the overall statutory structure. Their analysis amounts only to contending that, because Congress used the term "rights" in subsection (a) of Section 1232g with respect to parents' access to education records, Congress' failure to use that term in subsection (b) in connection with the parental consent requirement means that Congress did not intend to create any individual rights there. *Id.* at 22-23. Consistent with their treatment of FERPA as an undifferentiated whole, however, petitioners also note that they believe that even subsection (a)'s use of the term "rights" of inspection and review does not create any right enforceable under Section 1983. *Id.*at. 23 n.5. Thus, little weight can be given to their argument that the absence of the term "rights" in subsection (b) is significant.

In any event, it would be error to infer that Congress did not intend to create an individual right in Section 1232g(b)(2)(A) based on the absence of the term "rights" in that provision. To the extent the term "right" in subsection (a)

creates an individualized right of parents to inspect and review their child's education records (20 U.S.C. § 1232g(a)(1)(A), (B)), that interpretation would indicate that Congress also intended to create, in subsection (b), a parental right to withhold consent for unauthorized release of education record information.[4] An inspection and review right likely would be exercised by parents when an event, such as notification that the educational institution intends to release education record information to a third party, prompts concern about the accuracy or scope of their child's education records. Before granting such consent, parents may want to inspect and review their child's education records to ensure accuracy and determine whether they should seek to correct the records or insert an explanation under 20 U.S.C. § 1232g(a)(2). If there were no individualized right to enforce the parental consent requirement under Section 1232g(b)(2)(A), however, the parents' rights of inspection and review in such a situation would be meaningless. Release of the records could take place without notice to parents and would not allow the parents to exercise that right in a timely manner.[5]

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[4] Whether subsection (a) creates enforceable parental rights of access and review depends on a particularized analysis of that statutory provision and the particular right alleged, consistent with this Court's admonition in *Blessing*. For example, that analysis may differ to the extent that FERPA's administrative scheme could remedy the violation by a directive to the educational institution to provide such access.

[5] Any adverse inference drawn from the absence of the term "right" in the parental consent requirement of Section 1232g(b)(2)(A) would also be error in light of the reference elsewhere in FERPA to the parental consent requirement according parents and students "rights." *See* 20 U.S.C. § 1232g(d) (entitled: "Students' rather than parents' permission or consent") (specifying that, for purposes of FERPA, "whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student." *See also* 34 C.F.R. § 99.7(a)(2)(iii).

C. FERPA'S Legislative History Indicates That Congress Intended An Individual Parental Right To Prevent Release Of Education Record Information

1. FERPA's legislative history confirms that Congress intended to afford individual parents the right to withhold consent and prevent the release of education records. When the FERPA legislative proposals were first being brought to the attention of Congress, Representative Kemp discussed the competing interests of parents in protecting the privacy of education record information and of schools in using the information for educational purposes. He suggested an answer based on the practice at many universities that prohibited the release of student transcripts "unless the student or graduate specifically consents to the release of the transcript to a specified party." 120 Cong. Rec. 9370 (1974). He proposed that "there could be a release of information contained in these records, except for clearly defined internal purposes within an education system or systems, only when the parent or guardian of the student gave written prior consent, or once the student has reached the age of majority, he give it himself." *Ibid.*

Senator Buckley also focused on the individual rights of parents and students when he introduced FERPA, declaring the need to address the "systematic violation of privacy and personal rights, through the existence of secret files, of two of the largest classes of Americans"—school children and their parents. *Id.* at 13,951; *see also id.* at 13,952 (explaining that some educators had forgotten about parental responsibility and "think they have the right to do what they themselves think is best for the child, without regard for values and beliefs of the parents"); *id.* at 14,581 (FERPA "seeks to restore parental rights and to protect privacy"). Significantly, in explaining the comparable parental consent requirement regarding directory information (*see* pp. 22-23, *supra*), that

was added to FERPA in a retroactive amendment shortly after enactment, Senators Buckley and Pell, the proponents of the amendment, explained that it "would allow parents with unlisted telephone numbers, for example, to have the right to keep such numbers unlisted." *Id.* at 39,863; *see also* 121 Cong. Rec. 13,990-13,992 (1975) (speech by Senator Buckley explaining his reasons for introducing FERPA and citing the principle that "[t]here must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes without his consent"); *id.* at 13,991.

The materials and articles entered into the legislative record and referenced during the debates also focused on the individual rights of parents to make decisions about and to control what education record information schools could distribute about their children. *See, e.g.*, 120 Cong. Rec. 9928-9930, 9985-9987, 10,142-10,144 (1974) (reproducing Sarah C. Carey, *Students, Parents and the School Record Prison: A Legal Strategy for Preventing Abuses, reprinted in* 3 J.L. & Educ. 365 (July 1974)) (discussing "affirmative right of decisionmaking on the part of the parent;" urging, *inter alia*, that access to student records be denied to non-school personnel absent express consent of parents or student; emphasizing underlying right of control over records necessary to parental decisionmaking and enforcement of "personal rights"); 120 Cong. Rec. 14,580 (citing National Committee for Citizens in Education, J. William Rioux & S. A. Sandow, *Children, Parents and School Records* (May 1974)) (addressing concerns about who has access to school records "without parental-student control;" categorizing laws in 50 States regarding whether there is access by noneducational agencies to education records "without parent/student control"); *see also id.* at 13,954; 17,719 (citing same).

Furthermore, the injury to respondent's academic future and career caused by the release of his education record information without his consent or opportunity to correct or explain, is precisely the type of injury that concerned Congress. *See, e.g.*, 120 Cong. Rec. 14,580 (1974) ("[w]hen parents and students are not allowed to inspect school records and make corrections, numerous erroneous and harmful material can creep into the records. Such inaccurate material can have devastatingly negative effects on the academic future and job prospects of an innocent, unaware student."); *see also, e.g., id.* at 13,953-13,954 (reproducing Diane Divoky, *How Secret School Record Can Hurt Your Child*, Parade Magazine (Mar. 31, 1974)) (discussing various education records that included assessments of very young children's sexual tendencies based on unremarkable conduct, and one that described a child as a bed-wetter and her mother as an alcoholic "with a different boyfriend in the house each night").

2. Petitioners argue that the legislative history contains no indication of a congressional intent to allow private damages actions. Pet. Br. 29-31, 35. But the question is not whether Congress expressed an intent to create a damages action. Rather, the question is whether Congress expressed an intent to foreclose the otherwise presumptively available Section 1983 action to remedy violation of individual federal rights created under FERPA. Congress did not so indicate.

In any event, petitioners provide an incomplete picture of the legislative history. There are several references in the legislative record to court actions against educational institutions involving student privacy and education records, without any criticism of such actions or any other indication that Congress intended to prohibit a Section 1983 action to enforce a federal right under FERPA. *See, e.g.*, 120 Cong. Rec. 9635 (1974) (discussing *Doe* v. *MacMillan*, 412 U.S. 306 (1973) (Section 1983 action for damages and injunctive

relief brought by parents against school and other officials alleging that collection and publication of evaluations and test scores with students' names violated children's rights to privacy)); 120 Cong. Rec. 14,581 (1974) (discussing *Merriken* v. *Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973) (parents sought injunction against school's requiring child's participation in a survey about drug use)). *See also* 120 Cong. Rec. 39,863 (1974) (Joint Statement by Senators Buckley and Pell supporting amendment) ("[o]f course, the provisions of the amendment do not affect whatever rights a student or his parents might have in civil proceedings, as in the case where confidentially-received material causes the student or his parents actionable damage"); *id.* at 36,530 (article discussing court actions to have school records opened to parents and to have records not released to others, and describing successful suit for damages against school official releasing information about students' disciplinary violations). *See also* 20 U.S.C. § 1232g(j)(3) (as added by the Act of October 26, 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 507, 115 Stat. 272, 367-368 (2001) (providing that an educational institution "shall not be liable" to a person for production of education records that were produced in good faith in accordance with an *ex parte* court order authorized by the statute).

3. Petitioners also assert that the legislative history does not include any indication by Congress that it intended to create a "two-track enforcement system" under FERPA that subjects public and private schools to different enforcement schemes. Pet. Br. 31-32, 35. While petitioners are correct that public and private schools may be held liable for damages under Section 1983 in different ways, that is not the result of FERPA. Rather, any difference must be attributed to the limits on the scope of Section 1983 which, for example, prohibit a suit for damages against a State or state official and allow such a suit against a local governmental entity only in limited circumstances. *See* pp. 43-45, *infra*.

Petitioners claim, as well, that there is no evidence that Congress regarded state compensatory relief as inadequate. Pet. Br. 30 n.7; 39 n.11. The legislative record of FERPA does, however, contain several references to the inadequacy of state remedies. *See, e.g.*, 120 Cong. Rec. 9930 (1974) (article noting that "[m]ost states leave both the scope of school files and the terms of access to the discretion of state and/or local school authorities"); *id.* at 9985-9986 (article noting that, even where there are favorable state laws, "[a]ctual practice * * * tends to favor access by public officials, while disfavoring the parent"); *id.* at 14,580 (citing article that categorizes laws in 50 States to demonstrate the inconsistencies and inadequacies of state law protections, including column indicating that some States protect school personnel "from legal redress" for use of the contents of education records); *see also* 120 Cong. Rec. 9634-9635; 13,951-13,953 (1974).

II. FERPA's ADMINISTRATIVE SCHEME IS NOT SUFFICIENTLY COMPREHENSIVE TO SUPPLANT RESPONDENT'S SECTION 1983 SUIT

This Court reaffirmed in *Blessing* that, when its three-factor analysis concludes that a federal statutory provision creates an individual right, as is the case here, that right is presumptively enforceable under Section 1983. 520 U.S. at 341. Enforcement of such a right under Section 1983 can be barred only if Congress expressly forecloses a remedy by "forbidding recourse to § 1983 in the statute itself," or "impliedly by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Ibid.* (citing *Livadas* v. *Bradshaw*, 512 U.S. 107, 133 (1994)). Petitioners do not claim that any provision of FERPA expressly precludes respondent's Section 1983 suit. Respondent's Section 1983 action may, therefore, be proscribed only if petitioners "make the difficult showing that allowing a § 1983 action to go forward in these

circumstances 'would be inconsistent with Congress' carefully tailored scheme.'" *Blessing*, 520 U.S. at 346 (quoting *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 107 (1989) (citation and internal quotation marks omitted in *Blessing*)). Petitioners have failed to make such a showing.

A. FERPA's Administrative Scheme Does Not Provide Redress For An Individual Claim

This Court has found "a remedial scheme sufficiently comprehensive to supplant § 1983" on only two occasions. *Blessing*, 520 U.S. at 347 (citing *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U.S. 120 (1981), and *Smith* v. *Robinson*, 468 U.S. 992 (1984)). Most significantly, and as this Court emphasized in *Blessing*, the remedial schemes at issue in both those instances afforded private persons other avenues for obtaining relief. *See Blessing*, 520 U.S. at 347 (underscoring that the statutes at issue in *Sea Clammers*, 453 U.S. at 13, had "unusually elaborate enforcement provisions," including "two citizen-suit provisions"); *Blessing*, 520 U.S. at 347 (emphasizing that statute at issue in *Smith* v. *Robinson*, 460 U.S. at 1009, allowed "aggrieved individuals to invoke 'carefully tailored' local administrative procedures followed by federal judicial review").

The argument by petitioners (Br. 23-29, 34-39) and their *amici* (*e.g.*, U.S. Br. 23-30) that FERPA's administrative scheme is sufficiently comprehensive to preclude respondent's Section 1983 suit, cannot be reconciled with the limited rights in fact accorded parents or adult students under that scheme. FERPA's administrative scheme affords an individual no meaningful redress in any tribunal for the violation of rights under 20 U.S.C. § 1232g(b)(2)(A).

1. FERPA's regulations allow parents to mail a written complaint regarding an alleged violation of FERPA to the Family Policy Compliance Office (FPCO) of the Department

of Education. 34 C.F.R. § 99.63. FPCO determines whether the complaint is timely and whether the allegations give "reasonable cause" to believe that a violation of the Act or regulation has occurred. *See* 34 C.F.R. § 99.64(a). If FPCO believes that the complaint does not meet that standard, FPCO notifies the parents that it is not investigating the claim. 34 C.F.R. § 99.65(b). There is no adjudication of whether the legal standard for investigation was met. Parents are neither afforded a right to challenge FPCO's rejection of their complaint nor any right to appeal such a rejection.

If FPCO finds that a parent's complaint meets its standard for investigation, FPCO will investigate. 34 C.F.R. § 99.64(b). Once FPCO initiates an investigation, it notifies the complainant and the educational institution and asks the institution for a written response. 34 C.F.R. § 99.65(a). FPCO "may permit" submission of further arguments or information. 34 C.F.R. § 99.66(a). Parents do not, however, have a right to reply to the educational institution's response. Indeed, it appears that parents do not have the right to see the response from the educational agency. There is no provision for any hearing on a parent complaint or any opportunity for parents to request one.

After FPCO completes its investigation, it provides the complainant and the educational institution written notice of its findings and the basis for them. 34 C.F.R. § 99.66(b). Upon a finding of noncompliance with the statute, FPCO specifies the steps that the institution must take to comply within a reasonable period of time. 34 C.F.R. § 99.66(c). If FPCO finds that the institution has complied voluntarily with the statute, FPCO provides the complainant and the institution written notice of that decision and the basis for the decision. 34 C.F.R. § 99.67(b). Again, parents are not afforded any right to challenge FPCO's findings nor to seek review of them. There is no provision whatsoever for individual relief or for redress of an individual's injury caused by violation of a right under FERPA.

If the educational institution does not comply with FPCO's directive of the steps necessary to come into compliance, the Secretary may take action against the recipient under part D of GEPA, 20 U.S.C. § 1234 *et seq.* *See* 34 C.F.R. § 99.67(a); pp. 21-22 *supra*. The GEPA procedures address only the rights of fund recipients, not individual complainants. GEPA provides for hearings in the Office of the Administrative Law Judge, review by the Secretary, and ultimately a right to judicial review in the court of appeals for a fund recipient adversely affected by certain final agency actions. 20 U.S.C. § 1234g. The GEPA enforcement provisions do not afford any relief to parents or other individual complainants whose rights have been violated. Parents are not parties to the administrative proceeding. 34 C.F.R. § 81.2 (only "[a] recipient that appeals a decision" and the "authorized Departmental official who issues a decision that is appealed" are parties). Parents have no right to appear in the ALJ proceedings, or to appeal from the decision. An ALJ may allow their participation only as a non-party and as a matter of discretion. 34 C.F.R. § 81.7. A provision authorizing the Secretary to enter into formal compliance agreements specifies that affected parents and students are invited to participate in that hearing, 20 U.S.C. § 1234f(b), but that provision also explicitly states that the purpose of a compliance agreement is "to bring the recipient into full compliance with the applicable requirements of law as soon as feasible and not to excuse or remedy past violations of such requirements." 20 U.S.C. § 1234f(a).

The fact that FERPA's administrative scheme does not afford redress to individual parents is consistent with the statutory scheme. Petitioners and their *amici* point to Congress' grant of authority to the Secretary to establish an office and review board "for the purpose of investigating, processing, reviewing and adjudicating violations of this section and complaints which may be filed concerning alleged violations," of FERPA. 20 U.S.C. § 1232g(g). They

emphasize, in particular, the statute's references to "adjudicating" "complaints," and read that as authorizing agency adjudication of "individual complaints." *See* Pet. Br. 3, 10, 11, 25, 34, 36; U.S. Br. 5, 25. As demonstrated above, however, FPCO does not adjudicate complaints. Moreover, it is not designated by regulation to do so. The Secretary has designated FPCO only to "[i]nvestigate, process, and review complaints and violations" under the statute and regulations and to "[p]rovide technical assistance to ensure compliance" with the statute and regulations. 34 C.F.R. § 99.60(b)(1), (b)(2).[6]

The only adjudication of a "complaint" that is afforded under the FERPA administrative scheme is the adjudication of complaints that are issued by the Secretary under the GEPA enforcement provisions, 20 U.S.C. § 1234e(a), seeking a cease and desist order against a recipient. That appears to be the type of complaint to which Section 1232g(g) refers. See 20 U.S.C. § 1232g(f) (specifying that the Secretary shall take appropriate enforcement actions and deal with violations of the statute "in accordance with this chapter," referring to GEPA, which contains the administrative hearing procedures for fund recipients); see also 34 C.F.R. § 99.67(a)(2) (providing that, if FPCO review does not result in compliance by the educational institution, "the Secretary may," in accordance with part D of GEPA, "[i]ssue a compl[ai]nt to compel compliance through a cease-and-desist order"); *but*

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[6] Consistent with FPCO's limited investigation process, the regulations were amended in 1987 to eliminate FPCO's authority to require an educational institution to "afford access" to education records. The regulation was changed to authorize FPCO to require an educational institution to "submit reports," because that "more accurately reflect[s] the kind of investigation conducted by" FPCO. 52 Fed. Reg. 22, 252 (1987). At that time, the Secretary explained that, "[s]ince its inception, [FPCO] has not conducted any on-site visits to resolve complaints; rather it has resolved complaints through correspondence and telephone calls with the affected parties." *Ibid.*

see 34 C.F.R. §§ 99.63 -99.66 (also referring to "complaint" filed by parents or eligible student).

2. FERPA's "administrative enforcement arsenal [does] not compare to those in *Sea Clammers* and *Smith* [v. *Robinson*]." *Blessing*, 520 U.S. at 348. It is far more limited than the scheme at issue in either of those cases. Unlike the statutes at issue in *Sea Clammers*, 453 U.S. at 13-14, individuals do not have a right to sue to compel compliance nor does FPCO have the authority to seek criminal penalties. Unlike the statute in *Smith*, 468 U.S. at 1009, individuals do not have a right to administrative procedures followed by judicial review. The FERPA scheme also affords less individualized consideration than the schemes at issue in *Wright* and *Wilder*. It provides respondent neither a right or an opportunity for a hearing, nor any right to an administrative appeal. Thus, FERPA contains "no private remedy—either judicial or administrative" through which a person aggrieved by a violation of the parental consent requirement in Section 1232g(b)(2)(A) "can seek redress," and it is insufficient to supplant a Section 1983 action. *Blessing*, 520 U.S. at 348. The mere existence of FERPA's generalized administrative scheme cannot defeat respondent's ability to invoke section 1983. *Id.* at 347 (citing *Golden State*, 493 U.S. at 106).[7]

[7] The United States asserts that the agency's enforcement authority here should be regarded as exclusive based on an isolated characterization of the compliance mechanism created by the Act as being the "only means of enforcement" available. *See* U.S. Br. 27 n.16 (quoting 120 Cong. Rec. 36,534 (1974)). That characterization of the statutory scheme is contained in a prepared question that is quoted in the legislative history. The answer, however, characterizes the scheme quite differently. It explains that FERPA had been intended to include an express private right of action, by reference to another provision of the general education bill, but that that express right provision was no longer in that part of the law. 120 Cong. Rec. 36,534. Thus, the answer confirms that Congress did not view private enforcement under FERPA as inconsistent with the statutory scheme, although the intended provision for an express right to do so was eliminated by virtue of rejection of that provision in the other part of the legislation.

B. A Section 1983 Action Is Not Incompatible With FERPA's Administrative Scheme

Petitioners contend that enforcement of respondent's right under Section 1983 to withhold consent and prevent release of his education record information would be incompatible with administrative enforcement of FERPA. They claim that Section 1983 actions would be duplicative, would result in inconsistent judicial interpretations of the statute, that would run contrary to the centralized administrative enforcement intended by Congress, and would allow a damages remedy that would frustrate the statutory provision that affords an educational institution the opportunity to comply voluntarily before federal funding can be withheld. *See* Pet. Br. 24-29, 34-35, 35-39; *see also* U.S. Br. 23-30. A private action, like respondent's, that seeks redress for an injury that is not redressable through the administrative scheme, however, complements, rather than frustrates, that scheme.

1. A Section 1983 action to redress an injury caused by an educational institution's violation of FERPA's parental consent requirement, 20 U.S.C. § 1232g(b)(2)(A), is not duplicative of the administrative scheme. As demonstrated above, that scheme does not allow for adjudication of an individual claim and does not afford any redress for individual injury.

State law remedies also do not render duplicative a cause of action under Section 1983 to enforce the parental consent requirement under FERPA. First, as petitioners acknowledge, the existence of state law remedies is not a basis for supplanting respondent's cause of action under Section 1983. Pet. Br. 39 n.11 (citing *Wright*, 479 U.S. at 429). *See also Wilder*, 496 U.S. at 523 (citing *Patsy* v. *Board of Regents of*

Florida, 457 U.S. 496, 516 (1982)). Moreover, petitioners are incorrect about the availability of state law to redress the injury caused by a typical Section 1232g(b)(2)(A) violation. A violation of the parental consent requirement may not involve especially intimate information, albeit personal information that parents may not want disclosed. Cases that involve release of information that is truthful and of a less personal nature than that in this case may not support claims of defamation or invasion of privacy under state law. Finally, petitioners err in contending that "there is no evidence that Congress regarded compensatory relief as inadequate." Pet. Br. 39 n.11. As set forth above, the legislative record does contain such evidence. *See* p. 31, *supra*.

2. Availability of a Section 1983 action for violation of parental rights under Section 1232g(b)(2)(A) does not undermine the centralization of administrative enforcement. Judicial interpretation of FERPA is already part of the administrative scheme. Pet. Br. 20, 24; *see* U.S. Br. 28-29. Congress expressly provided for judicial review of the Secretary's enforcement actions against educational institutions. *See* 20 U.S.C. § 1234g. In addition, petitioners acknowledge that the United States can initiate actions to enforce FERPA. Pet. Br. 24 (citing *United States* v. *Miami Univ.*, *supra*). In any event, federal court review of an agency's interpretation of a federal statute does not undermine the agency's interpretation, but rather ensures that it is consistent with law. *See* 120 Cong. Rec. 36,532 (1974) (document introduced at request of Sen. Buckley) (noting that there will be questions about implementation of FERPA that may be resolved by regulation or administrative procedures, but emphasizing that "[t]hat is one of the reasons we have courts, where considerations of the intent of legislation, the test of reasonableness and of equity usually combine to produce proper and appropriate applications of the law"). Furthermore, numerous lower courts, including several federal courts of appeals, have held that a Section 1983 cause

of action is available to redress violations of FERPA. *See, e.g., Tarka* v. *Franklin*, 891 F.2d 102, 106 (5th Cir. 1989), *cert. denied* 494 U.S. 1080 (1990); *Fay* v. *S. Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986); Pet. App. 21a (citing cases). Petitioners cite no evidence that those rulings have led to problems in FERPA's administrative enforcement.

3. The damages remedy available in a Section 1983 action is not inconsistent with FERPA's administrative enforcement which affords an educational institution the opportunity to comply voluntarily before federal funds can be withheld. *See* Pet. Br. 24-25; U.S. Br. 29-30. The Court rejected such a view in the line of cases upholding the availability of damages in an implied cause of action under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992); *Gebser* v. *Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998); *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). Like FERPA, Title IX requires that an educational institution be afforded the opportunity to comply voluntarily before federal funds can be withheld. *See* 20 U.S.C. § 1682(2). In *Gebser*, that statutory requirement informed the standard that the Court established for recovery of damages under Title IX. 524 U.S. at 291-292. The Court held that, in a case that did not involve an official policy of the recipient, a plaintiff may recover damages under Title IX only if he establishes that an appropriate person at the educational institution had actual knowledge of the alleged discrimination and responded with deliberate indifference. *Id.* at 291.

The Court's decision in *Monell* already imposes comparable conditions in a Section 1983 action. *See* p. 44, *infra*. Moreover, as demonstrated above, Congress placed an additional limitation on liability here by applying the parental consent requirement only when an educational institution has a policy or practice of releasing such information. In addition, the standard for punitive damages (which are not

available at all against local governmental agencies) is even higher. *See* p. 45, *infra*. Therefore, the availability of a damages remedy under FERPA, as under Title IX, is not inconsistent with the statutory provision requiring an opportunity for voluntary compliance before federal fund withholding is allowed.

III. PETITIONERS' CHALLENGE TO THE *BLESSING* STANDARD IS WITHOUT MERIT

Despite the recent, unanimous, opinion of the Court in *Blessing*, petitioners assert on several occasions (Pet. Br. 3, 9, 12-20) that a more "rigorous" standard applies to this case. Although petitioners at times appear to acknowledge that *Blessing* controls here (*see id.* at 14, 32), they nonetheless also argue that, because FERPA was enacted pursuant to Congress' authority under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, a Section 1983 action will not lie unless Congress has manifested "an unambiguous intent" to create protected individual interests enforceable under Section 1983. Pet. Br. 12, 13, 14, 17 (citing *Suter*, 503 U.S. at 357, 363).

The fact that FERPA is Spending Clause legislation does not differentiate it from the statutes before the Court in *Blessing*, *Suter*, *Wright*, or *Wilder*, all of which involved statutes enacted pursuant to Congress' Spending Clause authority. Petitioners' attempt to portray the Court's pre-*Blessing* decision in *Suter* as requiring a showing of "unambiguous" congressional intent to create an enforceable right is without merit. The United States disagrees with petitioners' proffered standard (U.S. Br. 7-9) and makes clear that, "[r]ead in context, *Suter*'s references to unambiguity were simply a particularized application of *Pennhurst* [*State Sch. Hosp.* v. *Halderman*, 451 U.S. 1 (1981)], which requires Congress to make clear that it intends to impose binding conditions on the receipt of federal funds." U.S. Br. 8. It is

also evident from the Court's reliance on *Suter* in *Blessing* that the Court did not intend for *Suter* to go beyond the *Wilder* test. *Blessing*, 520 U.S. at 342-343.

Moreover, petitioners are wrong that, in order to recognize a federal statutory right enforceable under Section 1983, a court must find that Congress unambiguously included in the substantive statute a notice that there is a private cause of action available under Section 1983 to enforce the right. *See* Pet. Br. 12. A federal right is presumptively enforceable under Section 1983. *See, e.g., Wright*, 479 U.S. at 423-424. The Court already has explained that the requirement in *Pennhurst* that Congress act "unambiguously," applies to imposition of conditions on funding, not to "the remedies available" against a noncomplying recipient. *Bell* v. *New Jersey*, 461 U.S. 773, 790 n.17 (1983).

That is so because Congress has already provided the requisite notice in the text of Section 1983. Accordingly, the Court has held on several occasions (*e.g., Wilder, Golden State, Thiboutot*) that various statutory provisions create federal rights redressable under Section 1983, without mention of any unambiguous notice in the substantive statute to recipients that they are subject to suit if they violate the prohibition of Section 1983. *See also* U.S. Br. 7-9.

A. A Section 1983 Action Does Not Raise The Same Concerns As Does An Implied Cause Of Action

1. Without explaining why *Blessing* does not settle the matter, petitioners argue for a more rigorous standard based on principles of "federalism, separation of powers, and administrative deference." Pet. Br. 9; *see also id.* at 18-20. Petitioners assert that their rigorous standard for finding "§ 1983 rights" reflects those principles, and that those principles are "implicated by a judicial decision to find such a cause of action when Congress has not legislated one expressly," but has provided an administrative scheme. *Id.* at 9.

Petitioners do not identify any violation of federalism principles here. They refer to a discussion of the Spending Clause power and States' receipt of federal funds, but do not proffer any explanation of the consequences for that interest in this case. *See* Pet. Br. 18. There is no concern about subjecting States to suit here, because it has already been established that a State (or state official) cannot be sued for damages under Section 1983 in state or federal court, absent a waiver of immunity or consent. *See, e.g., Will* v. *Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). Moreover, the instant case does not involve any particular federalism interest because it involves a private university and its officials acting under color of state law, not a public institution or public officials.

Petitioners' purported separation of powers concerns (Pet. Br. 18-19) arise out of their misunderstanding of the differences between enforcement of a federal right under Section 1983 and the creation of an implied cause of action under a federal statute. Petitioners cite cases addressing whether courts should infer a cause of action where Congress has not expressly provided one. Pet. Br. 18-19 (citing *Alexander* v. *Sandoval*, 532 U.S. 275, 286, 287 (2001); *Cannon*, 441 U.S. at 743 (Powell, J., dissenting)); *see also* Pet. Br. 13 (citing *Gebser*, 524 U.S. at 287). In cases involving implied causes of action such as those, the Court's analysis "reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes." *Wilder*, 496 U.S. at 509 n.9. That concern does not arise here because this case involves an express cause of action under 42 U.S.C. § 1983—a private remedy already created by Congress. *Ibid.*

Petitioners' "administrative deference" argument (Pet. Br. 19-20) repeats their argument made elsewhere that a Section 1983 action is incompatible with FERPA's administrative scheme (*see id.* at. 23-29, 35-39). That argument is without merit for the reasons set forth above. See pp. 37-39, *supra*.

2. Petitioners' repeated reliance on cases involving implied causes of action also erroneously suggests that recognition of a right enforceable under Section 1983 has the same consequences as does a court's creation of an implied cause of action. *See also* U.S. Br. 10-13, 29 n.18 (citing *Sandoval, Cannon,* Title VI, and Title IX). When a court recognizes an implied cause of action, that cause of action and the remedies available thereunder, are, by definition, indeterminate in scope because the statute does not expressly address or limit them. *See e.g., Gebser*, 524 U.S. at 284-285. Petitioners' arguments suggest that a Section 1983 right would afford just as broad a remedy and that Congress should be viewed as just as unlikely to have taken such a step without expressly, or unambiguously, so stating.

Although there is a similarity between the Section 1983 inquiry and the first prong of the implied-cause-of-action analysis (*see Cort* v. *Ash*, 422 U.S. 66-75 (1975); *see* U.S. Br. 10, n.5), there are significant differences in the scope of a Section 1983 suit and an implied cause of action. *See Wilder*, 496 U.S. at 509 n.9. The cause of action for deprivation of a federal right under Section 1983 is limited by the express statutory text, as well as by its historical background. An implied cause of action, such as those under Title VI or Title IX, does not share that text or history.

First, as noted above, a State (as well as a State official acting in his official capacity) is not subject to suit for damages under Section 1983 in either state or federal court, absent consent or waiver. *Will*, 491 U.S. at 71. A state institution of higher education that is an arm of the State, as the overwhelming majority of state universities appear to be, is entitled to such immunities as well. *See, e.g., Regents of the University of California* v. *Doe*, 519 U.S. 425 (1997). Even in the few instances where a state university is not an arm of the State (a matter determined by reference to state law), no damages are available against it in any event if the money would come from State coffers. *Edelman* v. *Jordan*,

415 U.S. 651, 663 (1974). In fact, Section 1983 actions against state officials will lie only for prospective injunctive relief. *Ex Parte Young*, 209 U.S. 123 (1908).

Second, Congress made Section 1983 actions available only against persons that act "under color of" a state "statute, ordinance, regulation, custom, or usage." 42 U.S.C. § 1983. Thus, a private school and its officials generally cannot be sued under Section 1983. *See, e.g., Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982); *Richardson* v. *McKnight*, 521 U.S. 399, 412 (1997). It is only the exceptional case like respondent's, where a private school, or school official, acts under color of state law, that such an action can be brought.

Third, the circumstances are limited in which a Section 1983 action is available against local public entities, such as school boards. If a school district is an arm of the state, it is entitled to the same immunity as the State. *See Freeman* v. *Oakland Unified Sch. Dist.*, 179 F.3d 846 (9th Cir. 1999) (holding that a California school district is an arm of the State for purposes of the Eleventh Amendment). If a local school district is not an arm of the state, *see Mt. Healthy City School Dist. Bd. Educ.* v. *Doyle*, 429 U.S. 274, 280-281 (1977), it can be sued under Section 1983, but only when the alleged misconduct: "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body's officers;" is the action of a person with final decisionmaking authority for the entity; is caused by a policy of inadequate training or supervision (which requires proof of deliberate indifference); or is pursuant to a policy or custom of the entity. *Monell*, 436 U.S. at 690-695; *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 479-484 (1986); *City of Canton* v. *Harris*, 489 U.S. 378, 389-390 (1989). A Section 1983 action against a local public entity is limited because a public entity cannot be held liable under Section 1983 for actions of its employees under a respondeat superior theory. *Monell*, 436 U.S. at 691.

Section 1983 suits against individual public officials are limited as well because such officials are entitled to absolute immunity in certain instances, as petitioners elsewhere acknowledge, including when they perform legislative and judicial functions. *See* Pet. Br. 41 n.13. Public officials are also insulated from Section 1983 liability by the doctrine of qualified immunity. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law").

Finally, punitive damages are not available in an action under Section 1983 against a local public entity. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). The punitive damages that are available against individuals under Section 1983 are an unusual occurrence because there is an extremely exacting standard that must be met to support such an award. *Smith* v. *Wade*, 461 U.S. 30, 56 (1983) (punitive damages available in Section 1983 action only where the official's conduct is "shown to be motivated by evil motive or intent or when it involves reckless or callous indifference to the federally protected rights of others"). Again, this case is one of the extraordinary cases in which the petitioners' actions met that standard.[8] There does not appear

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[8] There are numerous facts unique to this case that place it in the exceptional category of cases warranting punitive damages: the education record information released was based upon hearsay, involved defamatory allegations of serious criminal conduct that were never subject to scrutiny in any type of hearing, and were of the most personal nature; petitioners never informed respondent of their investigation or the purported allegations of sexual assault; the victim did not report a sexual assault, denied that such an assault occurred, informed petitioners that they misunderstood the situation, and urged them not to take action against respondent; and when respondent and his family finally learned of the accusations included in respondent's education records, they were told by petitioners that they had no right of appeal. Finally, the $300,000 award in punitive damages was a much lesser sanction than withholding of federal funds would have been, in that petitioner Gonzaga received

to be another reported case over the course of the 27 years since enactment of FERPA, where that standard was met. That is true notwithstanding the fact that several courts of appeals have held that a Section 1983 action is available under FERPA. *See* pp. 38-39, *supra*.

The implied causes of action under Title VI and Title IX are not as limited in significant respects. Congress has expressly abrogated a State's immunity from suit in federal court for legal and equitable relief under those statutes. *See* 42 U.S.C. § 2000d-7(a). Also, the implied causes of action under Title VI and Title IX are not limited by the text of Section 1983 and are, therefore, available as a basis for suit against a private entity. *See Cannon*, 441 U.S. at 680 n.1 (Title IX action against private university). Whether punitive damages are available under an implied cause of action under Title VI and Title IX is as yet undetermined by this Court, but the question whether they are available in an implied cause of action under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) *et seq.*, is pending in *Barnes* v. *Gorman*, No. 01-682 (to be argued April 23, 2002).

The above-described limitations on suits brought under Section 1983, particularly as compared to the breadth of an implied cause of action, demonstrate that petitioners and their *amici* overstate the scope of the Section 1983 cause of action and the consequences of such actions.

B. Nineteenth Century Common Law Should Not Alter The *Blessing* Analysis

Petitioners' most sweeping argument (Br. 39-43) is that FERPA, as Spending Clause legislation, is a contract that third party beneficiaries cannot seek to enforce because such a right did not exist at the time of the enactment, in 1871, of Section 1983's predecessor statute.

"between $23 million and $30 million each year" in the "four academic years preceding the time of trial." Br. in Op. 11 n.4 (citing Exh. 54).

1. Petitioners contend that the Court should employ a different standard in determining whether Section 1983 is available to enforce a right conferred by Spending Clause legislation, as opposed to a right conferred by legislation enacted pursuant to other congressional authority. They claim that it is not "clear that the conditions in Spending Clause legislation qualify as 'laws' under § 1983." Pet. Br. 42 n.14. As petitioners' *amici* recognize, however, that argument is inconsistent with two decades of this Court's precedent holding that individuals may sue under Section 1983 to enforce rights under Spending Clause legislation. *See* Brief of States of Illinois, *et al.* 4; U.S. Br. 22-23.

Petitioners' argument also is premised on their characterization of FERPA as a "Spending Clause contract." Pet. Br. 39. The Court has described Spending Clause legislation as "much in the nature of a contract," *Pennhurst,* 451 U.S. at 17, and having "a contractual aspect." *Bennett* v. *Kentucky Dept. of Education,* 470 U.S. 656, 669 (1985). The Court also has emphasized, however, that federal grant programs "cannot be viewed in the same manner as a bilateral contract governing a discrete transaction." *Ibid.* The Court has explained that, "[u]nlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." *Ibid.* Once a State agrees to participate in a program, the requirements of federal funding become mandatory and binding. *See, e.g., Wilder,* 496 U.S. at 502. The Court has repeatedly recognized that Congress may employ that power to further broad policy objectives, in pursuit of the general welfare, by conditioning the receipt of federal funds on compliance by the recipient with federal statutory directives. *See South Dakota* v. *Dole,* 483 U.S. 203, 206-208 (1987).

That distinction between a condition on receipt of federal funding and a bilateral contract with the government is particularly clear here. Section 1221 of Title 20 provides

that, except as otherwise provided, GEPA (which includes FERPA and administrative procedures for actions against noncomplying recipients of federal educational funds), "applies to each applicable program of the Department of Education." 20 U.S.C. § 1221(b)(1). That Section goes on to specify that, except as otherwise provided, GEPA "does not apply to any contract made by the Department of Education." 20 U.S.C. § 1221(b)(2). Thus, Congress does not regard the recipients of federal educational funds as mere parties to a "Spending Clause contract."

2. Even if there were a basis for applying late Nineteenth Century contract law to determine the availability here of a Section 1983 action, petitioners' description of that law is incomplete. Petitioners cite various contracts treatises (Pet. Br. at 40, n.12), to paint a historical picture that erroneously suggests a categorical prohibition against third party beneficiary suits in 1871. The United States (Br. 20-22) presents a group of treatises to the contrary. In fact, several of the treatises cited by petitioners acknowledge that the law in the 1870s was less than settled in this area and undermine the broad claim that it "generally was the law in 1871" that a third-party could not sue to enforce a contract made for his benefit. *See* 1 Francis Hilliard, *The Law of Contracts* 425-427 (1872); 1 William W. Story, *A Treatise on the Law of Contracts* 509 (M. Bigelow ed. 1874); 2 Francis Wharton, *A Commentary on the Law of Contracts* 160-161 (1882).

3. Finally, the United States proffers a forceful argument that an appropriate analogy for Spending Clause legislation at the time of Section 1983's enactment is not a traditional bilateral contract, but rather that of a trust. *See* U.S. Br. 19-20. A federal funding recipient serves, in essence, as the trustee for the persons that Congress intended to benefit by its grant of funds. It was well-settled at the time of Section 1983's enactment, as it is today, that the beneficiaries of a trust possessed standing to sue the trustee for violation of the

trustee's obligation. *See Ibid.* Under that analogy, the intended beneficiaries of a funding statute maintain standing to bring an action under Section 1983.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Supreme Court of Washington.

Respectfully submitted.

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March 27, 2002

APPENDIX

20 U.S.C. § 1221 (2000) provides, in relevant part:

§ 1221. Short title; applicability; definitions

(a) Short title

This chapter may be cited as the "General Education Provisions Act".

(b) Applicability of chapter

(1) Except as otherwise provided, this chapter applies to each applicable program of the Department of Education.

(2) Except as otherwise provided, this chapter does not apply to any contract made by the Department of Education.

(c) Definitions

As used in this chapter, the following terms have the following meanings:

(1) The term "applicable program" means any program for which the Secretary or the Department has administrative responsibility as provided by law or by delegation of authority pursuant to law. The term includes each program for which the Secretary or the Department has administrative responsibility under the Department of Education Organization Act [20 U.S.C. 3401 *et seq.*] or under Federal law effective after the effective date of that Act.

* * * *

The Family and Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g (2000), as amended by Pub. L. No. 107-56, Title V, § 507, 115 Stat. 367 (2001), provides:

§ 1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State

educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4) (A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of

time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of Federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C)(i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted—

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if—

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student;

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and

their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J) (i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena.

Nothing in subparagraph (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from

disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding—

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(7)(A) Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 14071 of title 42 concerning registered sex offenders who are required to register under such section.

(B) The Secretary shall take appropriate steps to notify educational institutions that disclosure of information described in subparagraph (A) is permitted.

(c) Surveys or data-gathering activities; regulations

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate

assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Certain disciplinary action information allowable

Nothing in this section shall prohibit an educational agency or institution from—

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this Act or the Higher Education Act of 1965 [20 U.S.C. 1001 *et seq.*] shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or

policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if—

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a) of this section.

(j) Investigation and prosecution of terrorism

(1) In general

Notwithstanding subsections (a) through (i) or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General (or his designee) to—

(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of title 18 United States Code, or an act of domestic or international terrorism as defined in section 2331 of that title; and

(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or

in other administrative or judicial proceedings) such records, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

(2) Application and approval

(A) In general. An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain information described in paragraph (1)(A).

(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).

(3) Protection of educational agency or institution

An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.

(4) Record-keeping

Subsection (b)(4) does not apply to education records subject to a court order under this subsection.

20 U.S.C. § 1232i (2000), provides, in relevant part:

§ 1232i. Limitations on withholding of Federal assistance

(a) Refusal to supply personal data on students or families

Except as provided in section in section 1232g(b)(1)(D) of this title, the refusal of a State or local educational agency or institution of higher education, community college, school, agency offering a preschool program, or other educational institution to provide personally identifiable data on students or their families, as a part of any applicable program, to any Federal office, agency, department, or other third party, on the grounds that . constitutes a violation of the right to privacy and confidentiality of students or their parents, shall not constitute sufficient grounds for the suspension or termination of Federal assistance. Such a refusal shall also not constitute sufficient grounds for a denial of, a refusal to consider, or a delay in the consideration of, funding for such a recipient in succeeding fiscal years. In the case of any dispute arising under this section, reasonable notice and opportunity for a hearing shall be afforded the applicant.

20 U.S.C. § 1234 (2000), provides, in relevant part:

§ 1234. Office of Administrative Law Judges

(a) Establishment; duties

The Secretary shall establish in the Department of Education an Office of Administrative Law Judges (hereinafter in this subchapter referred to as the "Office") which shall conduct—

(1) recovery of funds hearings pursuant to section 1234a of this title,

(2) withholding hearings pursuant to section 1234d of this title,

(3) cease and desist hearings pursuant to section 1234e of this title, and

(4) other proceedings designated by the Secretary.

* * * * *

20 U.S.C. § 1234c (2000) provides:

§ 1234c. Remedies for existing violations

(a) Whenever the Secretary has reason to believe that any recipient of funds under any applicable program is failing to comply substantially with any requirement of law applicable to such funds the Secretary may—

(1) withhold further payments under that program, as authorized by section 1234d of this title;

(2) issue a complaint to compel compliance through a cease and desist order of the Office, as authorized by section 1234e of this title;

(3) enter into a compliance agreement with a recipient to bring it into compliance, as authorized by section 1234f of this title; or

(4) take any other action authorized by law with respect to the recipient.

(b) Any action, or failure to take action, by the Secretary under this section shall not preclude the Secretary from seeking a recovery of funds under section 1234a of this title.

20 U.S.C. § 1234d (2000), provides:

§ 1234d. Withholding

(a) Discretionary withholding

In accordance with section 1234c of this title, the Secretary may withhold from a recipient, in whole or in part, further payments (including payments for administrative costs) under an applicable program

(b) Notice requirements

Before withholding payments, the Secretary shall notify the recipient, in writing, of—

(1) the intent to withhold payments;

(2) the factual and legal basis for the Secretary's belief that the recipient has failed to comply substantially with a requirement of law; and

(3) an opportunity for a hearing to be held on a date at least 30 days after the notification has been sent to the recipient.

(c) Hearing

The hearing shall be held before the Office and shall be conducted in accordance with the rules prescribed pursuant to subsections (f) and (g) of section 1234 of this title.

(d) Suspension of payments

Pending the outcome of any hearing under this section, the Secretary may suspend payments to a recipient, suspend the authority of the recipient to obligate Federal funds, or both, after such recipient has been given reasonable notice and an opportunity to show cause why future payments or authority to obligate Federal funds should not be suspended.

(e) Findings of fact.

Upon review of a decision of the Office by the Secretary, the findings of fact by the Office, if supported by substantial evidence, shall be conclusive. However, the Secretary, for good cause shown, may remand the case to the Office to take further evidence, and the Office may thereupon make new or modified findings of fact and may modify its previous action. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(f) Final agency action

The decision of the Office in any hearing under this section shall become final agency action 60 days after the recipient receives written notice of the decision unless the Secretary either—

(1) modifies or sets aside the decision, in whole or in part, in which case the decision of the Secretary shall become final agency action when the recipient receives written notice of the Secretary's action; or

(2) remands the decision of the Office.

20 U.S.C. § 1234e (2000), provides:

§ 1234e. Cease and desist orders

(a) Issuance and contents of complaint

In accordance with section 1234c of this title, the Secretary may issue to a recipient under an applicable program a complaint which—

(1) describes the factual and legal basis for the Secretary's belief that the recipient is failing to comply substantially with a requirement of law; and

(2) contains a notice of a hearing to be held before the Office on a date at least 30 days after the service of the complaint.

(b) Appearance contesting order

The recipient upon which a complaint has been served shall have the right to appear before the Office on the date specified and to show cause why an order should not be entered by the Office requiring the recipient to cease and desist from the violation of law charged in the complaint.

(c) Report; issuance of cease and desist order

The testimony in any hearing held under this section shall be reduced to writing and filed with the Office. If upon that hearing the Office is of the opinion that the recipient is in violation of any requirement of law as charged in the complaint, the Office shall—

(1) make a report in writing stating its findings of fact; and

(2) issue to the recipient an order requiring the recipient to cease and desist from the practice, policy, or procedure which resulted in the violation.

(d) Report and order as final agency action

The report and order of the Office under this section shall become the final agency action when the recipient receives the report and order.

(e) Enforcement of final order

The Secretary may enforce a final order of the Office under this section which becomes final agency action by—

(1) withholding from the recipient any portion of the amount payable to it, including the amount payable for administrative costs, under the applicable program; or

(2) certifying the facts to the Attorney General who shall cause an appropriate proceeding to be brought for the enforcement of the order.

20 U.S.C. § 1234f (2000), provides:

§ 1234f. Compliance agreements

(a) Discretionary authority; purposes of agreements

In accordance with section 1234c of this title, the Secretary may enter into a compliance agreement with a recipient under an applicable program. The purpose of any compliance agreement under this section shall be to bring the recipient into full compliance with the applicable requirements of law as soon as feasible and not to excuse or remedy past violations of such requirements.

(b) Procedures applicable

(1) Before entering into a compliance agreement with a recipient, the Secretary shall hold a hearing at which the recipient, affected students and parents or their representatives, and other interested parties are invited to participate. The recipient shall have the burden of persuading the Secretary that full compliance with the applicable requirements of law is not feasible until a future date.

(2) If the Secretary determines, on the basis of all the evidence presented, that full compliance is genuinely not feasible until a future date, the Secretary shall make written findings to that effect and shall publish those findings, along with the substance of any compliance agreement, in the Federal Register.

(c) Contents

A compliance agreement under this section shall contain—

(1) an expiration date not later than 3 years from the date of the written findings under subsection (b)(2) of this section, by which the recipient shall be in full compliance with the applicable requirements of law, and

(2) those terms and conditions with which the recipient must comply until it is in full compliance.

(d) Failure of recipient to comply with terms and conditions

If a recipient fails to comply with the terms and conditions of a compliance agreement under this section, the Secretary may consider that compliance agreement to be no longer in effect, and the Secretary may take any action authorized by law with respect to the recipient.

20 U.S.C. § 1234g (2000), provides:

§ 1234g. Judicial review

(a) Recipients entitled to review; stay of action by Secretary

Any recipient of funds under an applicable program that would be adversely affected by a final agency action under section 1234a, 1234d, or 1234e of this title, and any State entitled to receive funds under a program described in section 1232d(a) of this title whose application has been disapproved by the Secretary, shall be entitled to judicial review of such action in accordance with the provisions of this section. The Secretary may not take any action on the basis of a final agency action until judicial review is completed.

(b) Petition for review; filing of record

A recipient that desires judicial review of an action described in subsection (a) of this section shall, within 60 days of that action, file with the United States Court of Appeals for the circuit in which that recipient is located, a petition for review of such action. A copy of the petition shall be transmitted by the clerk of the court to the Secretary. The Secretary shall file in the court the record of the proceedings on which the action was based, as provided in section 2112 of title 28.

(c) Findings of fact

The findings of fact by the Office, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Office to take further evidence, and the Office may make new or modified findings of fact and may modify its previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(d) Scope of review; Review by Supreme Court

The court shall have jurisdiction to affirm the action of the Office or the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

Supreme Court, U.S.
FILED
APR 8 2002
OFFICE OF THE CLERK

No. 01-679

IN THE

Supreme Court of the United States

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
Petitioners,

v.

JOHN DOE,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... ii

I. RESPONDENT'S NOVEL ARGUMENT REGARDING 20 U.S.C. § 1232g(b)(2)(A) IS NOT PROPERLY BEFORE THE COURT AND IS CONTRARY TO FERPA'S TEXT AND LEGISLATIVE HISTORY. 3

II. FERPA'S ADMINISTRATIVE ENFORCEMENT SCHEME IS INCOMPATIBLE WITH § 1983 ACTIONS. 10

III. CONGRESSIONAL INTENT TO CONFER § 1983 RIGHTS IN SPENDING CLAUSE LEGISLATION MUST BE EXPRESSED UNAMBIGUOUSLY..... 13

IV. THE CONGRESS THAT ENACTED § 1983 DID NOT REGARD THIRD-PARTY BENEFICIARIES OF GRANT CONDITIONS AS ENJOYING ENFORCEABLE "RIGHTS"..... 16

CONCLUSION 20

Petitioners' Rule 29.6 Statement appears at Pet. Br. ii.

TABLE OF AUTHORITIES

Page

Cases:

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 7,15

Arkansas Med. Soc'y, Inc. v. *Reynolds*, 6 F.3d 519 (8th Cir. 1993) 13

Baker v. *Gee*, 68 U.S. (1 Wall.) 333 (1863) 19

Bauer v. *Kincaid*, 759 F. Supp. 575 (W.D. Mo. 1991) 9

Bell v. *New Jersey*, 461 U.S. 773 (1983) 14

Bennett v. *New Jersey*, 470 U.S. 632 (1985) 16

Blessing v. *Freestone*, 520 U.S. 329 (1997) ..... *passim*

Board of Curators of Univ. of Mo. v. *Horowitz*, 435 U.S. 78 (1978) 12

Brown v. *City of Oneonta*, 106 F.3d 1125 (2d Cir. 1997), *cert. denied*, 122 S. Ct. 44 (2001) 5

Cullens v. *Bemis*, 1992 WL 337688, 979 F.2d 850 (6th Cir. 1992) 5

Davis v. *Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) 16

Doe v. *Broderick*, 225 F.3d 440 (4th Cir. 2000) 14

Ellison v. *Cocke Cty.*, 63 F.3d 467 (6th Cir. 1995) 14

Evergreen Presbyterian Ministries Inc. v. *Hood*, 235 F.3d 908 (5th Cir. 2000) 13

Falvo v. *Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203 (10th Cir. 2000), *rev'd on other grounds*, 122 S. Ct. 934 (2002) 5

Fay v. *South Colonie Cent. Sch. Dist.*, 802 F.2d 21 (2d Cir. 1986) 4

TABLE OF AUTHORITIES—Continued

Page

Cases:

Federal Elec. Comm'n v. *Akins*, 524 U.S. 11 (1998) 15

Franklin v. *Gwinnett Cty. Pub. Schs.*, 503 U.S. 60 (1992) 16

Garcia v. *United States*, 469 U.S. 70 (1984) 9

Gebser v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) 14,16

Harris v. *James*, 127 F.3d 993 (11th Cir. 1997) 14

Hendrick v. *Lindsay*, 93 U.S. 143 (1876) 17

Kelly v. *Robinson*, 479 U.S. 36 (1986) 9

Matsushita Elec. Indus. Co. v. *Epstein*, 516 U.S. 367 (1996) 3

National Bank v. *Grand Lodge*, 98 U.S. 123 (1878) 18,19

Owasso Indep. Sch. Dist. No. I-011 v. *Falvo*, 122 S. Ct. 934 (2002) 12

Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981) 14,16

Peralta v. *Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988) 3

Pierson v. *Ray*, 386 U.S. 547 (1967) 18

Regents of the Univ. of Mich. v. *Ewing*, 474 U.S. 214 (1985) 12

Rios v. *Read*, 73 F.R.D. 589 (E.D.N.Y. 1977) 10

Smith v. *Duquesne Univ.*, 612 F. Supp. 72 (W.D. Pa. 1985), *aff'd without op.*, 787 F.2d 583 (1986) 9

TABLE OF AUTHORITIES—Continued

Page

Cases:

Smith v. *Robinson*, 468 U.S. 992 (1984) 11

Stowell v. *Ives*, 976 F.2d 65 (1st Cir 1992) 13

Suter v. *Artist M.*, 503 U.S. 347 (1992) 13,15,16

Tarka v. *Cunningham*, 917 F.2d 890 (5th Cir. 1990) 5

Tucker v. *Ferguson*, 89 U.S. (22 Wall.) 527 (1874) 19

Webb v. *Webb*, 451 U.S. 493 (1981) 4

Western R.R. Co. of Minn. v. *DeGraf*, 6 N.W. 341 (Minn. 1880) 19

Wilder v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) 11

Wright v. *City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987) 2

Zaal v. *Maryland*, 602 A.2d 1247 (Md. 1992) 10

Statutes:

20 U.S.C. § 1232g(b)(1) ..... *passim*

20 U.S.C. § 1232g(b)(1)(B) 6

20 U.S.C. § 1232g(b)(2) ..... *passim*

20 U.S.C. § 1232g(b)(2)(A) 7

20 U.S.C. § 1232g(f) 2,12

20 U.S.C. § 1232g(g) 2,10

20 U.S.C. § 1234f(b) 10

42 U.S.C. § 1320a-2 14

42 U.S.C. § 1320a-10 14

TABLE OF AUTHORITIES—Continued

Page

Regulations:

34 C.F.R. § 81.7 10

34 C.F.R. § 99.63 10

34 C.F.R. §§ 99.64-.66 10

Legislative Materials:

120 Cong. Rec. 8505 (1974) 9

120 Cong. Rec. 9370 (1974) 9

120 Cong. Rec. 13,951 (1974) 9

120 Cong. Rec. 14,579 (1974) 7,8

120 Cong. Rec. 14,581 (1974) 9

120 Cong. Rec. 14,605 (1974) 8,9

120 Cong. Rec. 39,866 (1974) 2,12

Other Authorities:

4 Arthur L. Corbin, *Corbin on Contracts* § 782 (1963) 17

Peter Karsten, *The "Discovery" of Law by English and American Jurists of the Seventeenth, Eighteenth, and Nineteenth Centuries: Third-Party Beneficiaries as a Test Case*, 9 Law & Hist. Rev. 327 (1991) 16,17

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William W. Story, *A Treatise on the Law of Contracts Not Under Seal* (1st ed. 1844) 17

IN THE

Supreme Court of the United States

No. 01-679

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
Petitioners,

v.

JOHN DOE,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

REPLY BRIEF FOR PETITIONERS

When it enacted the Family Educational Rights and Privacy Act ("FERPA"), Congress:

- Sought to implement its objectives by imposing conditions on a school's receipt of federal funds, not by conferring rights on students or parents. 20 U.S.C. §§ 1232g(b)(1), (2).
- Expressed those conditions in terms of a school's "policy or practice," not in terms of any individual disclosure of records. *Id.*
- Specified that the Secretary of Education "shall take appropriate actions to enforce [FERPA] and to deal with violations of [FERPA]," and directed that the Secretary

attempt to achieve voluntary compliance before terminating funding. *Id.* § 1232g(f).

- Specified that the Secretary has responsibility for "investigating, processing, reviewing, and adjudicating violations of [FERPA] and complaints * * * concerning alleged violations of [FERPA]." *Id.* § 1232g(g).

- Directed that the Secretary do so at one centralized location, due to "concern that regionalizing the enforcement of the law may lead to multiple interpretations of it." 120 Cong. Rec. 39,866 (1974); *see* 20 U.S.C. § 1232g(g).

The Department of Education—the agency charged with implementing and enforcing FERPA—has concluded that these features confirm that the statute does not give rise to individual rights enforceable under § 1983. U.S. Br. 16 n.6. *See Wright* v. *City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 427 (1987) (agency opinion on whether statute is enforceable under § 1983 "is entitled to some deference by this Court").

Faced with the foregoing, respondent Doe argues—for the first time—that "quite different" language in subsections (b)(1) and (b)(2) of FERPA shows that Congress intended the latter (but not the former) to confer enforceable rights. Resp. Br. 13. The argument is wrong; (b)(1) and (b)(2) are textually and structurally quite similar, and each conditions funding on a school not having certain policies or practices. Doe's argument that FERPA's remedial scheme does not displace § 1983 fares no better: The argument essentially amounts to a showing that FERPA's remedy is different in important respects from that provided by § 1983, which is *our* point. Congress did not confer rights on students or parents in FERPA, and provided in FERPA the exclusive remedy for any violation of its terms. The contrary decision below should be reversed.

I. RESPONDENT'S NOVEL ARGUMENT REGARDING 20 U.S.C. § 1232g(b)(2)(A) IS NOT PROPERLY BEFORE THE COURT AND IS CONTRARY TO FERPA'S TEXT AND LEGISLATIVE HISTORY.

Respondent Doe now asserts that his § 1983 claim is *not* based on subsection (b)(1) of FERPA, which provides that "[n]o funds shall be made available * * * to any educational agency or institution which has a policy or practice of permitting the release of education records * * * of students without * * * written consent." 20 U.S.C. § 1232g(b)(1). Indeed, he concedes that this provision does not confer individual rights enforceable under § 1983. *See* Resp. Br. 24 (conditions in subsection (b)(1) "all fall short of creating an individualized parental right to prevent release of education record information by withholding consent"). Instead, for the first time, he asserts that the provision on which he premised his § 1983 claim is subsection (b)(2), and makes the novel argument that subsection (b)(2) confers rights because "Congress clearly said something quite different in paragraph (2) than it did in paragraph (1)." Resp. Br. 13. Respondent misconceives the statute.

1. As an initial matter, the Court need not entertain this argument because respondent did not raise it below and the Washington Supreme Court did not pass on it. *See Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996); *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988). None of the four briefs Doe submitted to the Washington Supreme Court, nor his brief to the Washington Court of Appeals, made the argument he makes here. *See* Wash. Supreme Ct. Dkt. Nos. 11, 16, 29, 40; Wash. Ct. App. Dkt. No. 46. They did not even *cite* paragraph (2) of section (b), and quoted only paragraph (1). Wash. Ct. App. Dkt. No. 46 at 48. Doe's complaint cited only subsection (b) generally, and tracked the language of (b)(1), not (b)(2). Record 1790-91. *See Blessing* v. *Freestone*, 520 U.S. 329, 342 (1997) (plaintiffs must "identify with particularity the rights they

claim[]" and the "complaint" must permit the court to "ascertain whether each separate claim satisfies the various criteria we have set forth for determining whether a federal statute creates rights"). This Court should not review Doe's new contention based on the language of subsection (b)(2), because the state court was not "apprised of the nature or substance of the federal claim." *Webb* v. *Webb*, 451 U.S. 493, 501 (1981).

2. Doe's argument seems to be that subsection (b)(2) creates individual rights enforceable under § 1983 because, he contends, it authorizes a parent or student to prevent individual instances of disclosure. Even though the provision plainly refers to institutional "policy or practice," Doe argues that the reference to parental consent does not modify the "policy or practice" language but rather is a freestanding right to stop a particular disclosure. Because he concedes that the asserted "right" does not apply against institutions that disclose records other than pursuant to a policy or practice, however, he is forced to frame the individual entitlement awkwardly as a "right to withhold consent and prevent the unauthorized release of personally identifiable information in education records by an educational institution that has a policy or practice of releasing, or providing access to, such information." Resp. Br. 14.

Respondent points to no court, and we are aware of none, that has adopted his new view of FERPA.[1] That is not

[1] With only one exception, none of the federal court of appeals decisions cited by respondent or his amicus analyzed whether FERPA's non-disclosure provision creates rights enforceable under § 1983. *See* Resp. Br. 39; ACLU Br. 16 n.3. Two of the cases did not address the non-disclosure provision at all because they arose under other FERPA provisions, and neither analyzed whether those provisions create enforceable rights. *Fay* v. *South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986) (alleged violation of FERPA's *access* provision; not addressing whether FERPA creates enforceable rights and considering only the comprehensive enforcement scheme question); *Tarka* v. *Cunningham*, 917 F.2d 890, 891 (5th Cir. 1990) (alleged violation of *hearing* provision; not analyzing § 1983 question and citing *Fay*). Later cases also did not analyze the § 1983 question, and instead merely relied on the earlier, off-point decisions. *See Brown* v. *City of Oneonta*, 106 F.3d 1125, 1131 (2d Cir. 1997), *cert. denied*, 122 S. Ct. 44 (2001); *Cullens* v. *Bemis*, 1992 WL 337688, at *1, 979 F.2d 850 (6th Cir. 1992) (unpublished disposition).

The *only* federal appellate decision discussing application of this Court's standards to the question presented here incorrectly applied those standards because it believed that "any analytical additions announced in *Suter* are no longer to be followed." *Falvo* v. *Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203, 1211 n.6 (10th Cir. 2000) (quotation omitted), *rev'd on other grounds*, 122 S. Ct. 934 (2002). Thus, *no* federal appellate authority applying this Court's current precedents supports the holding below.

surprising, because respondent's theory does not withstand even cursory reading of the statute. To begin with, subsection (b)(2) is not the only provision of FERPA that refers to parental consent. The first place parental consent is addressed is in subsection (b)(1), which provides that federal funds not be available to an institution that has a "policy or practice of permitting the release of education records * * * without * * * written consent." 20 U.S.C. § 1232g(b)(1). It could not be more clear that this funding condition is aimed at an institutional policy or practice of disclosure without consent, not rights of individual parents to withhold consent. This Doe concedes. Resp. Br. 24.

But the language and structure of (b)(1) and (b)(2) are essentially the same. Subsections (b)(1) and (b)(2) each provide that no funds be made available to a school with a particular policy or practice of disclosing student records. Subsection (b)(1) describes the unlawful policy or practice as disclosure "without the written consent of their parents." Subsection (b)(2) describes it as disclosure "unless * * * there is written consent from the student's parents." In each

case the reference to consent is in the context of a description of the type of policy or practice that triggers the funding prohibition. In each case it is the described policy or practice that violates FERPA, not any particular disclosure. *See* U.S. Br. 5, 15.

This reading does not "erase[ ]" subsection (b)(2) from the statute, as respondent contends. Resp. Br. 22. The description of the unlawful policy or practice appears in both (b)(1) and (b)(2) because the provisions address different questions: (b)(1) addresses to whom records may be disclosed without consent, while (b)(2) addresses how consent is to be obtained and when it may be dispensed with pursuant to a judicial subpoena. In each provision, however, the description of what triggers the funding prohibition is the same: a policy or practice of disclosing student records without proper consent. Such a policy or practice—not any particular disclosure—is what the Act forbids.

Respondent asserts that the other conditions FERPA places on institutions' policies and practices regarding release of education record information—such as providing notice and an opportunity for a hearing to challenge the content of records, 20 U.S.C. § 1232g(b)(1)(B)—are "less individualized" than the consent requirement in (b)(2), Resp. Br. 24, but that is not so. Conditioning federal funding on an institution not having a policy or practice of disclosure without *consent* is no more "individualized" than conditioning federal funding on an institution not having a policy or practice of disclosure without *notice*, or without an opportunity for a *hearing*. FERPA in each case is aimed at the "aggregate," rather than "whether the needs of any particular person have been satisfied." *Blessing*, 520 U.S. at 343.

Respondent's strained effort to divorce FERPA's reference to consent in (b)(2) from the "policy or practice" provision in which it appears—an effort to portray it as an "individual parental consent requirement," Resp. Br. 22—yields arresting

nonsequiturs. For example, he argues: "That the parental consent requirement applies only to an education institution that has a policy or practice of releasing education record information to persons other than those authorized under Section 1232g(b)(1) does not transform the parental consent requirement into a prohibition against a practice or policy, as petitioners contend." Resp. Br. 15. But of course it does.

Congress certainly addressed the privacy interests of students and parents in FERPA. It could have addressed those interests in rights-creating language by providing, for example, that "no student attending a school receiving federal funds shall have their records disclosed without their consent." *Cf.* 120 Cong. Rec. 14,579 (1974) (proposed original subsection (b)(1) of FERPA, which never became law, providing that "*[n]o student shall*, as a part of an applicable program, be required to undergo medical, psychological, or psychiatric examination, testing, or treatment, or immunization * * * or to reveal information about his or her personal or family life without the prior, informed, written consent of the student's parents") (emphasis added). Such phrasing would have focused on the "individual protected" rather than the "person regulated," and accordingly would have presented a stronger case for § 1983 rights. *See Alexander* v. *Sandoval*, 532 U.S. 275, 289 (2001). Even under respondent's tortured reading, the language of subsection (b)(2)(A) does not rise to that level.

Nor is FERPA phrased in terms that directly prohibit institutional conduct harmful to students, such as "schools receiving federal funds shall not release any student's records without consent." FERPA is not even phrased in terms that prohibit institutional policies harmful to students, such as "schools receiving federal funds shall not have a policy or practice of releasing any student's records without consent." FERPA instead provides that "[n]o funds shall be made available to" schools with such a policy or practice. As the Solicitor General points out, the Act is phrased not in terms

of the individual protected, or even the person regulated, but instead in terms of the funder—the Department of Education. *See* U.S. Br. 11-12. FERPA accordingly does not confer "an *individual* entitlement" on students enforceable under § 1983. *Bless*[illegible]*g*, 520 U.S. at 343 (emphasis in original).

3. The legislative history confirms that Congress chose to phrase FERPA's nondisclosure condition in terms of institutions rather than individuals. When introduced in the Senate, the bill included consent provisions aimed directly at individual students, using rights-conferring language.[2] These individually-focused provisions were divided from the bill and separately rejected by the Senate, *see* 120 Cong. Rec. 14,605 (1974), and Congress did not use such rights-conferring language in FERPA as enacted.

Respondent places great reliance on isolated remarks of members of Congress during floor debates and even on articles referred to in such remarks, but such materials are

[2] *See* 120 Cong. Rec. 14,579 (1974) (Section 437(b)(1)) ("*No student shall*, as a part of an applicable program, be required to undergo medical, psychological, or psychiatric examination, testing, or treatment, or immunization * * * or to reveal information about his or her personal or family life without the prior, informed, written consent of the student's parents.") (emphasis added); *id.* (Section 437(b)(2)) ("*No student shall*, as a part of any applicable program, be required, without the prior, informed, written consent of the student's parents, to participate in any project [sic] program, or course, the primary purpose or principal effect of which is to affect or alter the personal behavior or personal values of a student, or to explore and develop teaching techniques or courses primarily intended to effect [sic] such behavior and values.") (emphasis added); *id.* (Section 437(b)(3)) ("Parents shall be informed, reasonably in advance and in writing, of the intended participation of their child in any research or experimentation project which is a part of an applicable program. *No child shall* participate in such a project if the parents of such child object to such participation.") (emphasis added).

unreliable guides to congressional intent.[3] *See Garcia* v. *United States*, 469 U.S. 70, 76 n.3 (1984); *Kelly* v. *Robinson*, 479 U.S. 36, 51 n.13 (1986). To the extent they are accorded any weight at all, the remarks and articles at most suggest that members of Congress thought students and parents would benefit from FERPA, an unsurprising proposition considering that the aim of the law was to regulate disclosure of and access to student records. Those remarks pertaining to disclosure of records at all, rather than other issues such as whether schools should disregard the "values and beliefs of the parents," Resp. Br. 27 (quoting Sen. Buckley at 120 Cong. Rec. 14,581), or parental access to student records, *see id.*, do not indicate an intent to confer individually enforceable rights to withhold consent to particular disclosures of education records. To the contrary, statements of members, including one quoted by respondent, reinforce that Congress was concerned with "*systematic*" violations of student privacy. *Id.* (quoting 120 Cong. Rec. 13,951 (1974) (Sen. Buckley)) (emphasis added). *See* 120 Cong. Rec. 14,581 ("the requirement of parental consent * * * will encourage schools to improve these types of programs and to eliminate the potential for abuses beforehand") (Sen. Buckley). *See also Bauer* v. *Kincaid*, 759 F. Supp. 575, 590 (W.D. Mo. 1991) ("The underlying purpose of FERPA was not to grant individual students a right to privacy or access to educational records, but to stem the growing policy of many institutions to carelessly release educational information."); *accord Smith* v. *Duquesne Univ.*, 612 F. Supp. 72, 80 (W.D. Pa. 1985),

[3] Respondent gives pride of place to remarks by Representative Kemp, *see* Resp. Br. 27, but they were not even directed at the statutory language at issue. *See* 120 Cong. Rec. 9370 (1974); *id.* at 8505 (amendments introduced by Rep. Kemp). In addition, one of the articles on which respondent heavily relies was not read into the Congressional Record or quoted or discussed in the floor debates. It was merely "mention[ed]" during debate and was in fact not yet even published at that time. *See* Resp. Br. 28, 31 (citing article referred to at 120 Cong. Rec. 14,581).

aff'd without op., 787 F.2d 583 (3d Cir. 1986); *Zaal* v. *Maryland*, 602 A.2d 1247, 1255 (Md. 1992); *Rios* v. *Read*, 73 F.R.D. 589, 598 (E.D.N.Y. 1977).[4]

II. FERPA'S ADMINISTRATIVE ENFORCEMENT SCHEME IS INCOMPATIBLE WITH § 1983 ACTIONS.

We argued that the comprehensive, centralized administrative enforcement scheme that FERPA provides is incompatible with § 1983 actions and evinces Congress' intent to preclude such actions. Respondent objects that FERPA does not provide for complaints by parents and students, Resp. Br. 35, but he misconstrues the Act. Section 1232g(g) directed the Secretary to "establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of [FERPA] and complaints which may be filed concerning alleged violations of [FERPA]." Respondent misreads this provision when he suggests that it refers to adjudication of complaints filed by the Secretary rather than by parents and students. Parents and students file complaints with FPCO. *See* 34 C.F.R. § 99.63. FPCO reviews them and the school's response; may permit the parties to submit further written or oral arguments; and, following its review and investigation, issues a written notice of its findings and the basis for its findings. *See* 34 C.F.R. §§ 99.64-.66. Parents and students also may participate in hearings on violations of FERPA. *See* 20 U.S.C. § 1234f(b); 34 C.F.R. § 81.7. From these provisions and the broad range of enforcement tools the Act provides to the Secretary, it is apparent that FERPA provides

[4] Respondent argues that a private right of action to enforce FERPA's conditions would enable recovery of damages in situations not actionable under state tort law, such as where information disclosed is "truthful" or "less personal." Resp. Br. 38. But there is no evidence that Congress was concerned with providing a damages remedy in such situations, or any other.

what *Wright*, *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498 (1990), and *Blessing* did not—a detailed federal administrative procedure for private parties to complain about any alleged violation of the Act, and broad powers enabling the Secretary to correct such violations.

At bottom, Doe's complaint is not that Congress failed to provide a mechanism for resolution of individual parent and student complaints, but that Congress did not provide the full panoply of procedural rights and the damages remedy that a private right of action would afford. *See* Resp. Br. 32. But Congress' decision not to provide those things is precisely why a § 1983 remedy would be incompatible with the remedies Congress *did* expressly provide in FERPA. As respondent acknowledges, "[t]he fact that FERPA's administrative scheme does not afford redress to individual parents is consistent with the statutory scheme." Resp. Br. 34. The enforcement scheme Congress provided is tailored to the goal of institutional compliance precisely because FERPA is concerned with such compliance and does not confer individual rights. Congress wanted to ensure that federal funds not be provided to institutions that have policies and practices addressed by FERPA, but also did not wish to subject the institutions to an overly burdensome and diffuse system of remedial proceedings, appeals, and monetary damages. The fact that Congress provided an avenue for review of grievances under the Act, an avenue that supplies different procedures and remedies than would a right to sue in court, only confirms that inferring such a right would frustrate Congress' intent. As the Court put it in *Smith* v. *Robinson*, 468 U.S. 992, 1011, 1012 (1984), "[a]llowing a plaintiff to circumvent [such] administrative remedies" would "render [them] superfluous." Indeed, Doe never even invoked the administrative remedy provided under FERPA—the § 1983 action he chose instead rendered that remedy "superfluous."[5]

[5] Respondent points to no statement by a member nor any committee or conference report suggesting that Congress believed

There is a vast difference between proscribing certain institutional policies or practices and providing that the Secretary shall "deal with violations," 20 U.S.C. § 1232g(f), on the one hand, and, on the other, conferring individual rights on millions of students from kindergarten to graduate school with the understanding that any state-action violation of those rights would give rise to a federal action for damages plus attorneys' fees. Our legal tradition accords broad scope to school officials in the discharge of their important responsibilities. *See, e.g., Regents of the Univ. of Mich.* v. *Ewing*, 474 U.S. 214, 226 (1985) (noting "a reluctance to trench on the prerogatives of state and local educational institutions"); *Board of Curators of Univ. of Mo.* v. *Horowitz*, 435 U.S. 78, 91 (1978) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.") (quotation omitted). This Court has been guided by such considerations in construing the terms of FERPA itself. *See Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, 122 S. Ct. 934, 940 (2002) (rejecting proposed interpretation because "[w]e doubt Congress meant to intervene in this drastic fashion with traditional state functions").

There is no evidence whatever that Congress set itself so resolutely against this tradition when it came to the remedies available under FERPA. The express remedies Congress

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the compensatory remedies available under state law were in any way inadequate. Instead, he relies for this point solely on articles that focus on state administrative practices, not judicial damages remedies. *See* Resp. Br. 31. In any event, to the extent that Congress was aware that private judicial remedies for disclosure of student records predicated on state law already existed, *see id.* at 29-30, it only underscores that Congress saw no need to create additional privately actionable rights in FERPA. *See* 120 Cong. Rec. 39,866 (1974) (Joint Statement) (FERPA's provisions "do not affect whatever rights a student or his parents might have in civil proceedings").

provided demonstrate just the opposite. As the Department of Education and Solicitor General have concluded, FERPA's "enforcement mechanism should be regarded as exclusive." U.S. Br. 27.

III. CONGRESSIONAL INTENT TO CONFER § 1983 RIGHTS IN SPENDING CLAUSE LEGISLATION MUST BE EXPRESSED UNAMBIGUOUSLY.

We explained in our opening brief that this Court's precedents, as well as principles of federalism, separation of powers, and administrative deference, require that when Congress intends to confer § 1983 rights in Spending Clause statutes, it must do so unambiguously. *See* Pet. Br. 12-20. Both Doe and the Solicitor General assert that the "unambiguous" requirement of *Suter* v. *Artist M.*, 503 U.S. 347 (1992), refers only to funding conditions, and not to the remedies available for a breach of such conditions. Resp. Br. 41; U.S. Br. 8. *Suter* plainly provides otherwise: *See* 503 U.S. at 357 ("Did Congress, in enacting the Adoption Act, unambiguously confer upon the child beneficiaries of the Act *a right to enforce the requirement* that the State make 'reasonable efforts' to prevent a child from being removed from his home * * *?") (emphasis added); *id.* at 363 ("the 'reasonable efforts' language does not unambiguously confer *an enforceable right* upon the Act's beneficiaries") (emphasis added). This language shows that the "unambiguous" test applies to the conferring of "a right to enforce the requirement," not just to the imposition of the "reasonable efforts" requirement itself on the funding recipient. Accordingly, the courts of appeals have construed *Suter* as "plac[ing] great emphasis on the fact that rights must be 'unambiguously' conferred to be enforceable." *Arkansas Med. Soc'y, Inc.* v. *Reynolds*, 6 F.3d 519, 525 (8th Cir. 1993). *See Stowell* v. *Ives*, 976 F.2d 65, 68 (1st Cir. 1992); *Evergreen Presbyterian Ministries Inc.* v. *Hood*, 235 F.3d 908, 926-927 (5th Cir.

2000); *Doe* v. *Broderick*, 225 F.3d 440, 449 (4th Cir. 2000); *Ellison* v. *Cocke Cty.*, 63 F.3d 467, 472 (6th Cir. 1995).[6]

That is also clear from the fact that *Suter* recognized that the "reasonable efforts" requirement may be enforced by the Secretary. *See* 503 U.S. at 360, 363. That is, the requirement itself *was* unambiguously imposed on the recipient; if the issue had been the ambiguity of the funding condition—as Doe and the Solicitor General contend—not only the individual beneficiaries but also the Secretary would have been unable to enforce it. The Court's discussion of the "unambiguous" requirement plainly goes to the availability of an individual action remedy under § 1983. *See also Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (scope of remedy under Title IX dependent upon fact that statute is Spending Clause legislation in nature of contract).[7]

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[6] The Solicitor General vastly overreads 42 U.S.C. §§ 1320a-2, 1320a-10. *See* U.S. Br. 6, 9, 23. Those provisions simply addressed one part of the *Suter* opinion, which construed a statutory requirement that a state plan contain certain elements as at most giving rise to an enforceable right that the plan do so, rather than that the State comply with those elements. Sections 1320a-2 and 1320a-10 do not specify that any such element is enforceable under § 1983, and by their terms apply only to the Social Security Act. Nor do they address the requirement announced in *Pennhurst State School and Hospital* v. *Halderman*, 457 U.S. 1 (1981), and applied in *Suter*, that when Congress imposes § 1983 liability pursuant to the Spending Clause it do so unambiguously. The suggestion that these discrete provisions have anything broader to say about § 1983 jurisprudence is fanciful. *See Harris* v. *James*, 127 F.3d 993, 1002-03 (11th Cir. 1997) ("Section 1320a-2 does not purport to reject any and all grounds relied upon in *Suter*; it purports only to overrule certain grounds—*i.e.*, that a provision is unenforceable simply because of its inclusion in a section requiring a state plan or specifying the contents of such a plan.").

[7] The *only* authority cited by either Doe or the Solicitor General to the contrary is a footnote from *Bell* v. *New Jersey*, 461 U.S. 773, 790 n.17 (1983). Resp. Br. 41; U.S. Br. 8. That case concerned not § 1983 but the quite distinct question of the ability of the Secretary to pursue restitution to recover misspent federal funds. It is one thing to say that a funding recipient is reasonably on notice that it must repay misspent funds; quite another to say that such a recipient is similarly on notice that it is liable to third parties in § 1983 private damages actions.

The development of this Court's approach to determining whether Spending Clause statutes confer rights enforceable under § 1983 did not end with *Wilder*. *Suter* made clear that the test articulated in *Wilder* is applied to determining whether Congress "unambiguously confer[red] upon the * * * beneficiaries of the Act a right to enforce the requirement" at issue, 503 U.S. at 357, and *Blessing* confirmed that what must be "unambiguously confer[red]" was "an *individual* entitlement." 520 U.S. at 343 (emphasis in original). Under respondent's view, satisfying the *Wilder* test would require little more than meeting the standards a plaintiff must meet to establish Constitutional and prudential standing—*i.e.*, that he is within the "zone of interests" the statute was enacted to protect (that "the provision in question benefit the plaintiff"), and that the disclosure injured him in a distinct, judicially redressable manner (that the interest claimed to be injured is "not so 'vague and amorphous' that its enforcement would strain judicial competence"). *Cf., e.g., Federal Elec. Comm'n* v. *Akins*, 524 U.S. 11, 20, 24 (1998). *Suter* and *Blessing*, however, make clear that this is not all that is required to show that a plaintiff has a right enforceable under § 1983.

Those cases confirm that, at the end of the day, the "inquiry focuses on congressional intent," *Blessing*, 520 U.S. at 341, requiring "pains to analyze the statutory provisions in detail, in light of the entire legislative enactment." *Suter*, 503 U.S. at 357. Here as elsewhere "the judicial task is to interpret the statute Congress has passed." *Sandoval*, 532 U.S. at 286. *See id.* at 288 ("We therefore begin (and find we can end) our search for Congress's intent with the text and structure of

[the statute]."). Doing so, and applying the normal tools of statutory construction, reveals that Congress did not intend in FERPA to confer rights enforceable by § 1983.

IV. THE CONGRESS THAT ENACTED § 1983 DID NOT REGARD THIRD-PARTY BENEFICIARIES OF GRANT CONDITIONS AS ENJOYING ENFORCEABLE "RIGHTS".

We explained in our opening brief that the Congress that enacted § 1983 would not have understood conditions in Spending Clause legislation to confer enforceable "rights," because such legislation is in the nature of a contract and, when § 1983 was enacted, third-party beneficiaries typically enjoyed no rights under a contract. *See* Pet. Br. 39-42. Respondent Doe and the Solicitor General first object to treating Spending Clause enactments differently from other legislation in determining available remedies, Resp. Br. 47; U.S. Br. 18, but this Court has already held that the "contractual nature" of such laws "has implications for our construction of the scope of available remedies." *Gebser*, 524 U.S. at 287. The Solicitor General's next objection is that Spending Clause legislation does not result in "an ordinary contract," U.S. Br. 18, but we never suggested that it does—simply that the contractual nature of such enactments has consequences for how they should be construed. This Court has said as much on numerous occasions. *See, e.g.*, *Davis* v. *Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640 (1999); *Gebser*, 524 U.S. at 286; *Franklin* v. *Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 74 (1992); *Bennett* v. *New Jersey*, 470 U.S. 632, 638 (1985); *Pennhurst*, 451 U.S. at 17.

The Solicitor General also contends that third-party beneficiaries generally *were* able to sue under a contract when § 1983 was enacted. U.S. Br. 20. But not even the principal authority on which the Solicitor General relies supports that view of nineteenth century contract law. *See id.* (citing Peter Karsten, *The "Discovery" of Law by English and American Jurists of the Seventeenth, Eighteenth, and Nineteenth*

Centuries: Third-Party Beneficiaries as a Test Case, 9 Law & Hist. Rev. 327, 340-353 (1991)).

Indeed, according to that source, after 1820, American courts began to follow the English trend towards applying strict standards of privity and consideration, and "thereupon denied the third-party beneficiary the right to sue on the contract." *Id.* at 340.[8] *See also* 4 Arthur L. Corbin, *Corbin on Contracts* § 782 at 80-81 (1963) ("Many early cases, both English and American, expressly stated the rule that one for whose benefit a contract is made can enforce it[,] * * * *[but] there was a tendency away from it in the middle of the last century*") (emphasis added). Not surprisingly, then, treatises published contemporaneously with the enactment of § 1983 noted that, as a general rule, "no stranger to the consideration can take advantage of a contract, though made for his benefit." 1 William W. Story, *A Treatise on the Law of Contracts* 509 (M. Bigelow ed. 1874). *See* Pet. Br. 40 n.12 (citing authorities); *see also* William W. Story, *A Treatise on the Law of Contracts Not Under Seal* 83 (1st ed. 1844) ("As between the plaintiff and the defendant, there must be a privity of contract, and if the plaintiff be a mere stranger to the consideration, and no promise be made by the defendant to him * * * the action is not maintainable"). Although some authorities suggested the contrary, *see* U.S. Br. 21, and there certainly were exceptions to the general rule,[9] this Court

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[8] The Solicitor General's contention that American courts began enforcing stricter privity requirements *after* § 1983 was enacted is thus off by some 60 years. *See* U.S. Br. 22.

[9] This Court's decision in *Hendrick* v. *Lindsay*, 93 U.S. 143 (1876), involved one such exception. *See* U.S. Br. 21 (citing case). There, the plaintiff had executed a bond in reliance on a promise by the defendant to another that if the latter secured a bond to delay execution of a judgment the defendant would guarantee the issuer against loss. Thus, the plaintiff whose right to sue was upheld by the Court in that case had essentially performed services amounting to consideration. 93 U.S. at 146-148.

itself stated unanimously in 1878 that "[n]o doubt the *general rule* is that * * * privity must exist." *National Bank* v. *Grand Lodge*, 98 U.S. 123, 124 (1878) (emphasis added). *See id.* at 124-125 (again referring to "the *general rule* that privity of contract is required") (emphasis added).

That is all the proposition we assert requires. Our point, after all, is not that there were *no* circumstances under which third-party beneficiaries could sue, only that this was the general rule and—as such—that it is pertinent in assessing Congress' understanding of the scope of § 1983. *See, e.g.*, *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967) (adopting good faith and probable cause immunity under § 1983 for police officers acting under a statute later found unconstitutional, although existence of common law immunity in such a case "is not entirely free from doubt").

In any event, the Solicitor General is uncomfortable enough with the force of the contract law analogy to suggest that trust law provides a more appropriate model for Spending Clause legislation. In the Solicitor General's view, a recipient of federal funding "serve[s] as a trustee for the persons Congress intended its grants to benefit," and it was understood when § 1983 was enacted that a beneficiary may sue a trustee for violating the terms of the trust. U.S. Br. 19-20.

That, of course, is not how this Court has tended to view Spending Clause legislation, repeatedly invoking the contract law analogy instead. *See supra* at 16 (citing cases). The Solicitor General, however, asserts that the trust analogy "in fact was relied on in federal grant cases contemporaneous with the enactment of Section 1983." U.S. Br. 19. Each of the cases cited by the Solicitor General involved land grants from the federal government to States for the building of railroads. And what the Solicitor General neglects to explain is that the law was clear in those cases that third-party

beneficiaries of the conditions accompanying such grants had no right to enforce those conditions.

The only Supreme Court case the Solicitor General cites as an example of the "appropriate analogy," *Tucker* v. *Ferguson*, 89 U.S. (22 Wall.) 527 (1874), *see* U.S. Br. 19, explained that in the case of a default with respect to any of the conditions accompanying the federal grant, "it would be for the United States, by office found, or other proper proceeding, to assert their [*i.e.*, the United States'] rights. But they do not complain, *and the complainants cannot do it vicariously for them*." *Id.* at 571 (emphasis added). The Court cited for this proposition *Baker* v. *Gee*, 68 U.S. (1 Wall.) 333 (1863), a case in which a railroad company sought to enforce the condition in a federal land grant that the property be used only for a railroad, against Missouri's asserted power to modify that condition. As this Court held, "If this was a contest between the United States and the State of Missouri, the question of power would be a proper subject for examination. But the United States are not complaining, *and no other party has a right to complain*." *Id.* at 337 (emphasis added).[10]

In short, the "appropriate analogy" the Solicitor General would draw confirms that—at the time § 1983 was enacted—third parties could not enforce the terms of a federal grant. This should come as no surprise; it is simply a specific application of the "general rule" that third-party beneficiaries had no rights under a contract. *National Bank*, 98 U.S. at 124. The Congress that enacted § 1983 would therefore not

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[10] *See also Western R.R. Co. of Minn.* v. *DeGraf*, 6 N.W. 341, 343 (Minn. 1880) ("No one but the United States can complain that the conditions subsequent annexed to the grant of the state have not been complied with, or have been violated.") (citing *Baker* v. *Gee*). The cases the Solicitor General cites for the proposition that beneficiaries had the right to sue a trustee had nothing to do with federal grant conditions. *See* U.S. Br. 20.

have thought that such third parties had "rights" enforceable under that statute.

CONCLUSION

For the foregoing reasons, and those in petitioners' opening brief, the judgment below should be reversed.

Respectfully submitted,

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FEB 22 2002

No. 01-679

In the Supreme Court of the United States

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
PETITIONERS

v.

JOHN DOE

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a student may sue a private university for damages under 42 U.S.C. 1983 to enforce provisions of the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (1994 & Supp. V 1999), which bar the furnishing of federal funding to educational institutions that have a policy or practice of permitting education records to be released to unauthorized persons.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	4
Argument:	
The records-disclosure provisions of the Family Educational Rights and Privacy Act do not create private rights that may be enforced under 42 U.S.C. 1983	6
A. FERPA's records-disclosure provisions focus on funding by the Department of Education and the systemwide operations of educational institutions, not individual entitlements of students	7
1. The duties under FERPA's records-disclosure provisions run primarily to the Deparment of Education	10
2. The funding conditions under FERPA's records-disclosure provisions focus on the systemwide "policies and practices" of fund recipients	13
3. An analogy to nineteenth century contract law is not an appropriate basis for refusing to recognize substantive rights enforceable under Section 1983	18
B. Recognizing a Section 1983 action would frustrate the enforcement mechanisms Congress provided in FERPA	23
Conclusion	30
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 10
Bell v. *New Jersey*, 461 U.S. 773 (1983) 8
Bennett v. *Kentucky Dep't of Educ.*, 470 U.S. 656 (1985) 18
Blessing v. *Freestone*, 520 U.S. 329 (1997) ..... *passim*
California v. *Sierra Club*, 451 U.S. 287 (1981) 12
Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 10, 11, 12
Chicago, B. & Q.R. Co. v. *Attorney General*, 5 F. Cas. 594 (C.C.D. Iowa 1875) (No. 2666), aff'd on other grounds, 94 U.S. 155 (1876) 19
Cort v. *Ash*, 422 U.S. 66 (1975) 10
Dalton v. *Little Rock Family Planning Servs.*, 516 U.S. 474 (1996) 19
Duncan v. *Jaudon*, 82 U.S. (15 Wall.) 165 (1872) 20
Edelman v. *Jordan*, 415 U.S. 651 (1974) 29
Farmers' Loan & Trust Co. v. *Henning*, 8 F. Cas. 1045 (C.C.D. Kan. 1878) (No. 4666) 19
Golden State Transit Corp. v. *City of Los Angeles*, 493 U.S. 103 (1989) 7, 14, 23
Hendrick v. *Lindsay*, 93 U.S. 143 (1876) 21
Lawrence County v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985) 19
Madison & P.R. Co. v. *Wisconsin*, 16 F. Cas. 366 (C.C.W.D. Wis. 1879) (No. 8938) 19
Maine v. *Thiboutot*, 448 U.S. 1 (1980) 6, 29
Middlesex County Sewerage Auth. v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) 7, 23
National Bank v. *Grand Lodge*, 98 U.S. 123 (1878) 23
Oliver v. *Piatt*, 44 U.S. (3 How.) 333 (1845) 20
Owasso Ind. Sch. Dist. v. *Falvo*, No. 00-1073 (Feb. 19, 2002) 7

Cases—Continued: Page

Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981) 7, 8, 10, 12, 15, 16, 18
Pennsylvania v. *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851) 19
Rosado v. *Wyman*, 397 U.S. 397 (1970) 29
Schemerhorn v. *Vanderheyden*, 1 Johns. (N.Y.) 139 (1806) 21
Smith v. *Robinson*, 468 U.S. 992 (1984) 7, 23
Suter v. *Artist M.*, 503 U.S. 347 (1992) 6, 7, 8, 29
Townsend v. *Swank*, 404 U.S. 282 (1971) 19
Tucker v. *Fergerson*, 89 U.S. (22 Wall.) 527 (1874) 19
United States v. *Miami Univ.*, 91 F. Supp. 2d 1132 (S.D. Ohio 2000), appeal pending, No. 00-3518 (6th Cir.) 25, 26
Wilder v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) 6, 7, 11, 13, 24, 29
Wright v. *City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987) 6, 11, 24

Constitution, statutes and regulations:

U.S. Const. Art. I, § 8, Cl. 1 (Spending Clause) 6, 12, 18, 20, 30
Act of Oct. 26, 2001, Pub. L. No. 107-56, § 507, 115 Stat. 367 2
Civil Rights Act of 1964, Tit. VI, 42 U.S.C. 2000d 11, 12, 13, 29
Education Amendments of 1972, Tit. IX, 20 U.S.C. 1681 ..... 11, 12, 13, 29
20 U.S.C. 1221(c) (1994 & Supp. V 1999) 2
Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232 *et seq.*:
20 U.S.C. 1232g (1994 & Supp. V 1999) 1, 1a
20 U.S.C. 1232g(a) (1994 & Supp. V 1999) 1, 1a
20 U.S.C. 1232g(a)(1)(A) (1994 & Supp. V 1999) 2, 15, 1a
20 U.S.C. 1232g(a)(1)(C)(iii) 15, 16, 2a
20 U.S.C. 1232g(a)(3) (1994 & Supp. V 1999) 2, 3a

Statutes and regulations—Continued: Page

20 U.S.C. 1232g(a)(4) 10
20 U.S.C. 1232g(a)(4)(A) 2, 4a
20 U.S.C. 1232g(b) (1994 & Supp. V 1999) 1, 9, 14, 15, 6a
20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999) 2, 5, 10, 11, 15, 6a
20 U.S.C. 1232g(b)(1)(A)-(J) (1994 & Supp. V 1999) 2, 6a
20 U.S.C. 1232g(b)(2) 2, 10, 12, 15, 9a
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Pt. 81, subpt. A 26
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Regulations—Continued: Page

Pt. 99 3
Section 99.1 ..... 2, 17a
Section 99.3 ..... 10, 18a
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Section 99.63 ..... 25, 48a
Section 99.64(a) 25, 48a
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In the Supreme Court of the United States

No. 01-679

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
PETITIONERS

v.

JOHN DOE

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns the enforcement of the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232g (1994 & Supp. V 1999), which applies to educational agencies and institutions that receive financial assistance under federal education programs administered by the Secretary of Education. 20 U.S.C. 1232g(a) and (b) (1994 & Supp. V 1999). FERPA directs the Secretary to "take appropriate actions to enforce" FERPA and "deal with violations of" the Act, 20 U.S.C. 1232g(f), and to establish an office and review board for the purpose of "investigating, processing, reviewing, and adjudicating" complaints alleging violations of FERPA, 20 U.S.C. 1232g(g).

STATEMENT

1. The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232g (1994 & Supp. V 1999), prohibits the Secretary of Education from providing federal funding to any public or private "educational agency or

institution," unless it complies with requirements established by FERPA concerning access to and disclosure of students' education records. 20 U.S.C. 1232g(a)(1)(A), (a)(3), and (b)(1), 1221(c) (1994 & Supp. V 1999); see also 34 C.F.R. 99.1. This case concerns an unauthorized release of education records. Subsection (b) of FERPA provides, in relevant part:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein * * *) of students without the written consent of their parents to any individual, agency, or organization.

20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999); accord 20 U.S.C. 1232g(b)(2).[1] If a student has reached the age of eighteen or is enrolled at a postsecondary educational institution, the school must seek consent for the release of records from the student instead of the parents. 20 U.S.C. 1232g(d). The "education records" covered by FERPA generally are defined as "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. 1232g(a)(4)(A).

FERPA expressly directs the Secretary to "take appropriate actions to enforce" FERPA and "to deal with violations," in accordance with enforcement authority conferred elsewhere in Title 20. 20 U.S.C. 1232g(f); see 20 U.S.C. 1234

[1] FERPA permits disclosure if one of sixteen exceptions applies. See, *e.g.*, 20 U.S.C. 1232g(b)(1)(A)-(J) (1994 & Supp. V 1999); 20 U.S.C. 1232g(b)(6) (Supp. V 1999); 20 U.S.C. 1232g(b)(7)(A); 20 U.S.C. 1232g(i); 20 U.S.C. 1232g(j) (added by Pub. L. No. 107-56, Title V, § 507, 115 Stat. 367 (2001)).

et seq. FERPA further requires the Secretary to establish an office and review board within the Department of Education to "investigat[e], process[], review[], and adjudicat[e] violations of" FERPA and "complaints which may be filed concerning alleged violations of" FERPA. 20 U.S.C. 1232g(g). The Secretary has promulgated regulations interpreting FERPA's requirements and establishing an administrative review procedure for processing individual complaints under FERPA. 34 C.F.R. Pt. 99. FERPA specifically provides for centralized control over its administration and interpretation. 20 U.S.C. 1232g(g) ("[E]xcept for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices" of the Department of Education.).

2. Petitioner Gonzaga University is a private university that offers teacher training through its School of Education. Pet. 3; Pet. App. 30a. During the relevant time period, Washington's teacher certification regulations required student teachers to obtain from their universities a certificate of good moral character and personal fitness to teach. See Pet. App. 40a-42a (discussing Wash. Admin. Code § 180-75-082 (1997) (*repealed* effective Mar. 8, 1997)). Petitioner Roberta League is Gonzaga's teacher certification specialist. Pet. App. 2a.

While a student of elementary education at Gonzaga, respondent had a sexually intimate relationship with Jane Doe. Pet. App. 2a. In October 1993, League overheard a complaint that respondent might have engaged in acts of sexual misconduct against Jane Doe. *Ibid.* League investigated and obtained information suggesting that respondent might have raped Jane Doe. See *id.* at 3a-6a. League discussed the allegations with an investigator for the state agency responsible for teacher certification, to whom League identified respondent by name. *Id.* at 5a. Based on the information obtained during the investigation, the Dean refused to

provide respondent with the moral character affidavit needed for his teacher certification. *Id.* at 6a.

3. Respondent filed suit against petitioners in state court, alleging violations of FERPA and Washington tort and contract law. See Pet. App. 34a-35a. Following trial, a jury found in respondent's favor on all of his claims and awarded him $1,155,000 in damages. *Id.* at 36a. The award included $150,000 in compensatory damages and $300,000 in punitive damages against petitioners for the violation of FERPA. *Ibid.*

The Court of Appeals of Washington reversed. Pet. App. 30a-53a. With respect to respondent's FERPA claim, the court concluded that FERPA does not create individual rights enforceable under Section 1983, reasoning that "FERPA requires participating schools to have in place a system-wide plan; the law is not intended to ensure that 'the needs of any particular person have been satisfied.'" *Id.* at 47a.

The Washington Supreme Court reversed in relevant part and reinstated the FERPA judgment and damages award. Pet. App. 1a-28a. The court concluded that FERPA creates privately enforceable rights because it "is intended to benefit students," FERPA's terms are amenable to judicial enforcement, and FERPA's obligations are mandatory. *Id.* at 20a.

SUMMARY OF ARGUMENT

A. In determining whether a federal statute gives rise to a Section 1983 action, this Court asks first whether the statutory provision in question creates personal entitlements of the sort that may be enforced through the medium of a private judicial cause of action. FERPA's non-disclosure rule creates no such personal rights. FERPA's text—which provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution"

that fails to comply with FERPA's confidentiality provisions (20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999))—speaks not in terms of a benefitted class, nor even in terms of the obligations of fund recipients. Rather, FERPA operates directly on the Department of Education, regulating that agency's disbursement of federal funds. The purported class of private beneficiaries is thus two steps removed from the principal focus of the statutory text. When Congress intends to create individual substantive rights, it usually does not legislate so elliptically.

Furthermore, to the extent FERPA's disclosure provisions focus on the recipients of federal financial assistance, they refer only to the systemwide "polic[ies] or practice[s]" of those recipients. 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999). The statute thus is not concerned with individualized instances of non-consensual disclosure. It therefore resembles the type of provisions that this Court held in *Blessing* v. *Freestone*, 520 U.S. 329 (1997), do not create private rights under Section 1983. While FERPA strengthens and reinforces the preexisting privacy rights of students and their parents, FERPA's disclosure provisions themselves are framed as a federal overlay of rules and guidelines for record management by educational institutions. In short, FERPA's disclosure provisions complement extant rights; they do not create new ones.

B. Even if FERPA were to be construed as creating individual entitlements, recognition of a cause of action under Section 1983 to enforce the statute would be inappropriate because Congress has directed the Secretary, not the courts, to "enforce" FERPA and "deal with" violations, and to investigate and adjudicate individual complaints. 20 U.S.C. 1232g(f) and (g). FERPA thus contains precisely what was missing in other cases where this Court has found a Section 1983 action to be available: a federal tribunal for the resolution of individual charges arising under FERPA.

Congress, moreover, made clear that the administration and interpretation of FERPA should remain centralized and under the control of the Secretary of Education. 20 U.S.C. 1232g(g). Superimposing on that administrative scheme a Section 1983 action that could be invoked by any of the 58 million public school students subject to FERPA in any state or federal court across the country would displace Congress's intended unitary enforcement procedures with precisely the myriad, decentralized sources of enforcement and interpretive authority that Congress wished to avoid.

ARGUMENT

THE RECORDS-DISCLOSURE PROVISIONS OF THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT DO NOT CREATE PRIVATE RIGHTS THAT MAY BE ENFORCED UNDER 42 U.S.C. 1983

Section 1983, 42 U.S.C. 1983, creates a private cause of action against any person who, under color of state law, deprives another "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. This Court held in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), that Section 1983 "means what it says" and thus authorizes suits by private individuals against state actors who violate rights created by federal "laws," including laws enacted pursuant to Congress's authority under the Spending Clause, U.S. Const. Art. 1, § 8, Cl. 1. *Thiboutot*, 448 U.S. at 4. This Court has reaffirmed that holding on numerous occasions. See, *e.g.*, *Blessing* v. *Freestone*, 520 U.S. 329, 340 (1997); *Suter* v. *Artist M.*, 503 U.S. 347, 355 (1992); *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 508 (1990); *Wright* v. *City of Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 423 (1987). Congress has ratified *Thiboutot*'s construction of Section 1983. See 42 U.S.C. 1320a-2, 1320a-10.

Not every violation of a federal statute, however, constitutes a deprivation of "rights" within the meaning of Section

1983. *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 106 (1989). The statute must create individual, judicially enforceable rights. *Ibid.*; see also *Blessing*, 520 U.S. at 340; *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 15-30 (1981). In addition, the statute must not foreclose private enforcement either expressly or impliedly. *Blessing*, 520 U.S. at 341; *Golden State*, 493 U.S. at 106; see also *Smith* v. *Robinson*, 468 U.S. 992, 1009-1013 (1984); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13-20 (1981). Under those principles, a cause of action does not lie under Section 1983 for private enforcement of FERPA's records disclosure provisions.[2]

A. FERPA's Records-Disclosure Provisions Focus On Funding By The Department Of Education And The Systemwide Operations Of Educational Institutions, Not Individual Entitlements of Students

Under this Court's decision in *Blessing*, a federal statute creates judicially enforceable "right[s]," within the meaning of Section 1983, if (i) Congress intended that the provision in question benefit the putative plaintiff; (ii) the provision is unambiguously binding and mandatory on the States, rather than precatory; and (iii) the right is not so "vague and amorphous" that its enforcement would "strain judicial competence." 520 U.S. at 340-341; see also *Wilder*, 496 U.S. at 509.

At the outset, petitioners err in contending (Pet. 9-11) that the appropriate test for discerning whether the statute creates privately enforceable rights is not *Blessing/Wilder*'s three-part test, but is instead whether Congress "unambiguously confer[red]" (Pet. 9) a right to a private action under Section 1983 (Pet. 9 (quoting *Suter* v. *Artist M.*, 503 U.S. at 357)). In *Suter*, the Court held that private individuals could

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[2] The Court reserved this question in *Owasso Independent School District* v. *Falvo*, No. 00-1073, slip op. 3-4 (Feb. 19, 2002).

not sue to enforce a provision of the Social Security Act that required States receiving funds for adoption assistance to submit a plan to the Secretary of Health and Human Services in which the State agreed, among other things, to make "reasonable efforts" to keep children in their own homes. 503 U.S. at 351. That language did not create rights privately enforceable under Section 1983, the Court explained, because the statute required only that "the State have a plan approved by the Secretary which contains the 16 listed features," *id.* at 358. Beyond that, the "reasonable efforts" proviso "impose[d] only a rather generalized duty," *id.* at 363, and "left a great deal of discretion" to the State, *id.* at 362.

Read in context, *Suter*'s references to unambiguity were simply a particularized application of *Pennhurst*, which requires Congress to make clear that it intends to impose binding conditions on the receipt of federal funds. As *Suter* observed, *Pennhurst* establishes that, "'if Congress intends to impose a condition on the grant of federal money, it must do so unambiguously.'" *Suter*, 503 U.S. at 356 (quoting *Pennhurst*, 451 U.S. at 17). In *Suter*, the Court held that, although the requirement that the State have the "reasonable efforts" provision in its state plan was mandatory, the content of the generalized "reasonable efforts" standard was too amorphous, ambiguous, and subject to variation based on circumstances to be privately enforceable in any particular case. See 503 U.S. at 360, 362-363. That, in fact, is how this Court understood *Suter* in *Blessing*. See 520 U.S. at 345.

Once Congress makes clear its intention to impose binding conditions on the receipt of federal funds, however, ordinary rules of statutory interpretation apply to determine the scope of those conditions and their means of enforcement. Congress need not go further and warn in advance of "the remedies available against a noncomplying State." *Bell* v. *New Jersey*, 461 U.S. 773, 790 n.17 (1983). Section 1983's

text already makes that clear. Indeed, none of the statutes at issue in *Blessing*, *Wilder*, *Golden State*, *Thiboutot*, or other cases in which this Court found an action under Section 1983 available, contained such unambiguous remedial language. Moreover, to the extent petitioners read *Suter* as imposing requirements for determining that an action under Section 1983 is available that go beyond those applied in prior cases, Congress has since provided otherwise with respect to the very statute under which *Suter* arose—the Social Security Act. See 42 U.S.C. 1320a-2, 1320a-10.[3] The proper test for identifying rights enforceable under Section 1983 thus remains, as this Court recognized in *Blessing*, the three-part inquiry outlined above.

Applying that test, the records-disclosure provisions of FERPA fail to support recognition of a right to private enforcement under Section 1983. In particular, although the question is a close one, the combination of how Congress structured the funding restriction and how it phrased the prohibitory language in FERPA, taken together, demonstrates that FERPA's disclosure provisions do not create individual rights.[4]

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[3] Section 1320a-2 (like Section 1320a-10) provides:

> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., [503 U.S. 347] (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in Suter v. Artist M. that section 671(a)(15) of this title is not enforceable in a private right of action.

[4] FERPA appears to satisfy the second and third prongs of the *Blessing* test, however. FERPA's disclosure requirements, 20 U.S.C. 1232g(b), are neither precatory nor vague and amorphous. The statute provides as a condition of federal funding that "education records," as

1. The Duties Under FERPA's Records-Disclosure Provisions Run Primarily to the Department of Education

As this Court has recognized in the context of identifying whether a federal statute creates an implied right of action, the focus of the statutory text provides the most persuasive evidence of whether Congress intended its provisions to benefit a particular class in the sense necessary to render them judicially enforceable in a lawsuit brought by a private party. See *Alexander* v. *Sandoval*, 532 U.S. 275, 288-289 (2001); *Cannon* v. *University of Chicago*, 441 U.S. 677, 690-693 (1979). The same is true in deciding whether "rights" are "secured" by a federal statute for purposes of invoking the express cause of action under Section 1983.[5]

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defined by the statute and regulations (20 U.S.C. 1232g(a)(4); 34 C.F.R. 99.3), and personally identifiable information within those records may not be released or disclosed "without the written consent of the[] parents" or unless one of the sixteen carefully drawn exceptions applies. 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999); see also 20 U.S.C. 1232g(b)(2). Nor does FERPA simply "nudge" fund recipients "in the preferred direction[]." *Pennhurst*, 451 U.S. at 19. Its prohibition on policies and practices of unauthorized disclosure as a condition of federal funding is direct and mandatory.

[5] There is an obvious parallel between the inquiry under Section 1983 whether Congress "intended that the provision in question benefit the plaintiff," *Blessing*, 520 U.S. at 340, and the initial inquiry in implied-right-of-action analysis whether "the statute was enacted for the benefit of a special class of which the plaintiff is a member," *Cannon*, 441 U.S. at 689. See also *Pennhurst*, 451 U.S. at 28 n.21 (holding that, because the statute "confers no substantive rights," there was no need to decide "whether there is a private cause of action under that section or under 42 U.S.C. § 1983 to enforce those rights"). The remaining *Cort* v. *Ash*, 422 U.S. 66 (1975) factors—whether Congress intended to create or deny a remedy, whether the remedy would be consistent with the underlying purposes of the legislative scheme, and whether it would be inappropriate to infer a cause of action because the matter is traditionally governed by state law (*id.* at 78)—have no direct application to determining whether the cause of action Congress expressly created in Section 1983 is available to vindicate the statutory right. That is because the implied cause of action inquiry

In *Blessing*, for example, the Court found no individual right to judicial enforcement of the requirement that state child support systems be in "substantial compliance" with the statute and federal regulations because that provision spoke in terms of regulating the interactions of the state and federal governments, rather than creating new federal rights for individual beneficiaries. See 520 U.S. at 335, 343. The rent provision at issue in *Wright*, by contrast, was found to create an individually enforceable right because the statute provided formulae and other standards specifying and limiting the amount of rent that local public housing authorities could charge to a tenant family. 479 U.S. at 420 & n.2. Similarly, this Court has held that Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972, protect individuals against discrimination and create individually enforceable rights because those statutes are phrased "with an unmistakable focus on the benefited class." *Cannon*, 441 U.S. at 691; see 42 U.S.C. 2000d ("[n]o person" shall "be subjected to discrimination under any program or activity receiving Federal financial assistance" on the basis of race, color, or national origin); 20 U.S.C. 1681 ("[n]o person" shall "on the basis of sex * * * be subjected to discrimination under any education program or activity receiving Federal financial assistance").

FERPA's prohibition on non-consensual disclosures is distinctively phrased as a limitation on the Department of Education's disbursement of federal funds. See 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999) ("No funds shall be made

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reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes. Because § 1983 provides an "alternative source of *express* congressional authorization of private suits," these separation-of-powers concerns are not present in a § 1983 case.

Wilder, 496 U.S. at 508-509 n.9 (citations omitted); see also *id.* at 525-526 (Rehnquist, C.J., dissenting).

available under any applicable program * * *."); 20 U.S.C. 1232g(b)(2) (same). Unlike the terms of Titles VI and IX, FERPA does not direct that "no parent or student shall be subjected to nonconsensual disclosures of their education records or personally identifiable information contained therein." Nor does FERPA specifically prohibit or require certain conduct on the part of entities that receive federal funds, unlike the statutes in *Wright*, *Wilder*, *Suter*, and *Blessing*. Rather, FERPA speaks directly to the federal funding agency—the Department of Education—barring it from furnishing financial assistance to an educational institution under the specified circumstances.

When statutes are phrased in such a manner, there is "far less reason to infer a private remedy in favor of individual persons," or, by the same token, to hold that Congress intended the legislation to benefit the plaintiff class in the direct and individualized sense that would support recognition of a private right of action. *Cannon*, 441 U.S. at 690-691; see also *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981) (same); *Pennhurst*, 451 U.S. at 13 (statute not designed to benefit plaintiff class where, *inter alia*, the statutory provision was phrased in terms of federal and state governments' "obligation to assure that public funds are not provided to any institutio[n]" that does not comply with federal standards). Indeed, in *Cannon*, the Court indicated that it likely would not have found an individually enforceable right if Title IX had been written simply "as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." 441 U.S. at 692-693; see also *id.* at 693 n.14. That is exactly how Congress structured FERPA.

This case differs in another respect from those in which this Court has found a private right under a federal Spending Clause statute that can be enforced through Section 1983. Respondent did not sue under Section 1983 to obtain

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the benefit or service that the funding statutes support—namely, education. He sued to obtain damages for Gonzaga's failure to comply with a condition on furnishing of the funds. FERPA itself does not provide funds to educational institutions to comply with its terms. Nor does FERPA impose the type of elaborate plan or reporting requirements required in *Wilder*, 496 U.S. at 502-503, and *Blessing*, 520 U.S. at 332-335, in which the fund recipient commits to and explains in detail how it will use the federal funds to deliver the benefits or services that are the *raison d'etre* of the federal funding scheme. FERPA's disclosure provisions are structured, not as a system for delivering entitlements to individuals, but rather as a statutory directive "to guide the [fund recipient] in structuring" its systems for maintaining records and to superintend the administration of records created by the recipient in the course of providing the substantive programs and services (education) that are the focal point of the federal funding scheme. *Blessing*, 520 U.S. at 344. In this respect—and especially in the absence of the rights-creating language present in Titles VI and IX—FERPA's conditions on the furnishing of federal financial assistance bear a closer resemblance to the data-processing and similar administrative requirements that this Court held in *Blessing* did not give rise to individualized rights, *id.* at 344-345, than the claims to particular substantive, in-hand benefits and services that this Court has previously recognized support a Section 1983 action.

2. The Funding Conditions Under FERPA's Records-Disclosure Provisions Focus on the Systemwide "Policies and Practices" of Fund Recipients

The manner in which Congress phrased the scope of FERPA's prohibition on unauthorized disclosures—focusing on "polic[ies] or "practice[s]" (20 U.S.C. 1232g(b)(1))—likewise cuts against the recognition of individual rights that can be enforced under Section 1983. In determining whether a

statute creates such rights, it is not enough that a statute's operation inures generally to the benefit of persons in the plaintiff's class. Rather, the plaintiff must demonstrate that the "provision in question," *Golden State*, 493 U.S. at 106, "creat[es] an *individual entitlement* to services," benefits, or immunity from governmental action. *Blessing*, 520 U.S. at 343 (latter emphasis added). For example, the provision of the Social Security Act at issue in *Suter* required States to exert "reasonable efforts" to keep children in their own homes. While the overall operation of that provision no doubt was intended to protect the interests of parents and children, the Court held that it imposed only a "generalized duty" on the State and thus did not create individually enforceable rights. Likewise, in *Blessing*, the Court held that the requirement that States operate child support programs in "substantial compliance" with extensive federal requirements undoubtedly benefitted children and their custodial parents as a class. The provision, however, did not vest children or parents with individual rights; it served instead as a "yardstick for the Secretary [of Health and Human Services] to measure the *systemwide* performance of a State's Title IV-D program." 520 U.S. at 343.

Applying that standard, the Washington Supreme Court erred in holding that FERPA creates individual rights based on the generalized goal, gleaned from the legislative history, of "assur[ing]" and "protect[ing]" parents' and students' privacy interests. Pet. App. 20a (quoting 120 Cong. Rec. 39,862 (1974) (Joint Explanatory Statement of Sponsors)). The proper inquiry is whether Section 1232g(b)'s disclosure requirements create an individual "entitlement" (*Blessing*, 520 U.S. at 343), on a case-by-case basis, not to have records impermissibly disclosed. They do not.

FERPA's disclosure provisions do not make educational institutions liable for every non-consensual release of education records. They forbid the furnishing of financial assistance only to those educational institutions that have a "policy or practice" of permitting non-consensual disclosure. 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999); 20 U.S.C. 1232g(b)(2). FERPA thus targets an educational institution's systemwide approach to disclosing records and information and, to that end, requires that operational rules be in line with federal requirements. The Act provides no specific protection against particular instances of disclosure and, in that sense, is not concerned with "whether the needs of any particular person have been satisfied." *Blessing*, 520 U.S. at 343.

Moreover, the non-disclosure provisions in Section 1232g(b) spell out in some detail the components of a proper school program for the disclosure of records and the personally identifiable information they contain. Those provisions speak in operational terms of rules and standards governing disclosure, rather than in terms of individual rights or entitlements. The nondisclosure provisions read more like an administrative manual to govern decisions by school officials than a charter of student and parental entitlements. See 120 Cong. Rec. 39,863 (1974) (Joint Statement) (FERPA "establish[es] a minimum Federal standard for record confidentiality and access"); cf. *id.* at 39,862 ("The amendment is intended to require educational agencies and institutions to conform to fair information record-keeping practices.") (discussing records access under FERPA). Indeed, unlike its other provisions, FERPA's disclosure provisions do not refer to parental or student "right[s]." Compare 20 U.S.C. 1232g(b)(1) & (2) (1994 & Supp. V 1999) and 20 U.S.C. 1232g(b)(2) with 20 U.S.C. 1232g(a)(1)(A), (a)(1)(C)(iii), (c), (d), and (e). Instead, the disclosure provisions have a systemic focus. See *Pennhurst*, 451 U.S. at 22.[6]

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[6] We have been informed by the Department of Education that its Family Policy Compliance Office, which administers FERPA (see 34 C.F.R. 99.60(a) and (b)), has issued letters of findings applying FERPA's

Nor does the presence of "rights" language in other FERPA provisions support the Washington Supreme Court's ruling. In the first place, this case concerns only subsection (b) of FERPA, and *Blessing* makes clear that "each separate" statutory provision must satisfy the analytical test for identifying Section 1983 rights on its own, without regard to whether other statutory provisions might create such rights. 520 U.S. at 342.

In any event, the description of a statutory directive as a "right" does not, in itself, control the question of whether Congress intended to "secure[]" those "rights" in the specific sense in which those terms are used in Section 1983. The Court must consider the statutory language and legislative history in context and in light of the Act's overall structure. See *Pennhurst*, 451 U.S. at 18-20 (references to rights and patient "bill of rights" do not create individually enforceable rights when read in the context of the statute as a whole).

There are, to be sure, many references in FERPA and its legislative history to the "rights" of parents and students

terms to particular factual scenarios and finding a violation of FERPA's disclosure provisions without separately inquiring whether the alleged misconduct was part of a larger policy or practice of the educational institution. In some of the letters, the existence of a policy or practice can fairly be inferred from the context (see Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Dr. Kenneth L. Bates (Mar. 11, 1999) (routine meetings with school district officials); Letter from Director Rooker to Dr. Curtis Culwell (Aug. 5, 1998) (disclosure by school principal). In others, it appears unlikely that the charged conduct represented an institutional policy or practice. See Letter from Director Rooker to Dr. Gregory Adkins (Apr. 8, 1997); Letter from Director Rooker to Dr. Joseph Bonita (Oct. 5, 1998). In none of those letters, however, was the Compliance Office called upon to consider the import of the "policy or practice" language. We have lodged copies of those letters with the Clerk of the Court. The Department of Education has now considered that question in the context of this case, and the position taken in this brief is the position of the Department.

protected by FERPA.[7] But most such references serve simply as a shorthand means of describing the records-maintenance and disclosure standards and procedures that Congress imposed on fund recipients. Others just refer to the parents' and students' preexisting "moral or legal rights" to privacy, S. Conf. Rep. No. 1026, 93d Cong., 2d Sess. 186 (1974); H.R. Conf. Rep. No. 1211, 93d Cong., 2d Sess. 186 (1974), to which FERPA adds an additional layer of federal protection, and not to the creation of new and independent federal rights that give rise to a cause of action under Section 1983 for damages. See 120 Cong. Rec. 14,589 (1974) (Sen. Goldwater) (FERPA provides "statutory confirmation" of parental rights); *id.* at 14,590 (in FERPA, "Congress is willing to be the guardian of [student] privacy").

Indeed, without suggesting that FERPA created new federal entitlements or judicially enforceable rights, Congress was at pains to make clear that FERPA "do[es] not affect" whatever preexisting "rights a student or his parents might have in civil proceedings, as in the case where confidentially-received material causes the student or his parents actionable damage." 120 Cong. Rec. 39,863 (1974) (Joint Statement); H.R. Conf. Rep. No. 1211, *supra*, at 187 ("the amendment is intended to protect the legitimate rights of students to be free from unwarranted intrusions"); 120 Cong. Rec. 26,125 (1974) (Rep. Hanrahan) (FERPA "denies funds to schools" when they engage in a "blatant violation of the individual's right to privacy").[8]

[7] See, *e.g.*, 20 U.S.C. 1232g(a)(1)(C)(iii), (d), (e); 120 Cong. Rec. 14,589 (1974) (Sen. Goldwater); 120 Cong. Rec. 26,125 (1974) (Rep. Hanrahan).

[8] In this case, respondent has obtained almost $650,000 based on state law causes of action for invasion of privacy, defamation, and breach of educational contract. Pet. App. 36a.

3. An Analogy to Nineteenth Century Contract Law Is Not an Appropriate Basis for Refusing to Recognize Substantive Rights Enforceable Under Section 1983

Although, on balance, FERPA's disclosure provisions do not create substantive rights under federal law, it would be erroneous to adopt the contention in the petition (Pet. 13-14) that individuals may not enforce the provisions of Spending Clause legislation through actions under Section 1983 because, at the time Section 1983 was enacted, a third-party beneficiary of a contract could not sue to enforce its terms. See also *Blessing*, 520 U.S. at 349-350 (Scalia & Kennedy, JJ., concurring) (leaving open the possibility of adopting that theory).

First, the argument proceeds from an erroneous premise. There is no sound basis for subjecting Spending Clause legislation to a different analysis under Section 1983 than legislation enacted under other sources of congressional power. It is commonplace for a federal law not to govern the conduct of a party unless and until that party voluntarily undertakes the particular activity that is subject to the law, whether that be choosing to operate sewage plants subject to the Clean Water Act, marketing driver's license information subject to the Driver's Privacy Protection Act of 1994, or accepting federal funds under a federal program. The voluntariness with which entities agree to subject themselves to the obligations of federal law thus cannot be determinative of Section 1983 liability.

Second, while this Court has often said that a law enacted pursuant to the Spending Clause operates "in the nature of a contract," *Pennhurst*, 451 U.S. at 17, neither the law itself nor the resulting arrangement with a fund recipient constitutes an ordinary contract. See *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985) ("[T]he program cannot be viewed in the same manner as a bilateral contract governing

a discrete transaction."). The Act of Congress establishing the program remains binding law with the full force and preemptive authority of federal legislation under the Supremacy Clause, and thus falls squarely within the "laws" covered by Section 1983 and is fully capable of "secur[ing]" rights, within the meaning of that Act. See *Dalton* v. *Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996); *Lawrence County* v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 257-258 (1985); *Townsend* v. *Swank*, 404 U.S. 282, 285 (1971). Courts have traditionally adjudicated claims that rights vested in third parties by statutes were being invaded by one of the regulated parties. See, *e.g.*, *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 565-566 (1851) (person not a party to an interstate compact, but who was injured by its violation, was entitled to "a civil remedy for an injury done by an obstruction").

Third, at the time Section 1983 was enacted, an appropriate analogy for Spending Clause legislation—and one that in fact was relied on in federal grant cases contemporaneous with the enactment of Section 1983—was that the recipient served as a trustee for the persons Congress intended its grants to benefit. See, *e.g.*, *Tucker* v. *Ferguson*, 89 U.S. (22 Wall.) 527, 572 (1874) ("The State accepted the grant subject to all the conditions prescribed. She thereupon became the agent and trustee of the United States."); *Madison & P. R. Co.* v. *Wisconsin*, 16 F. Cas. 366 (C.C.W.D. Wis. 1879) (Harlan, J.) (No. 8938); *Farmers' Loan & Trust Co.* v. *Henning*, 8 F. Cas. 1045 (C.C.D. Kan. 1878) (No. 4666); *Chicago, B. & Q. R. Co.* v. *Attorney General*, 5 F. Cas. 594 (C.C.D. Iowa 1875) (No. 2666), aff'd on other grounds, 94 U.S. 155 (1876).[9] The

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[9] See also Joel Prentiss Bishop, *The First Book of the Law Explaining the Nature, Sources, Books, and Practical Applications of Legal Science and Methods of Study and Practice* § 468 (Boston 1868) ("The principle on which a third person is permitted to recover, on a promise made by the defendant for his benefit, in cases where * * * no part of the consi-

trust analogy comports with the congressional intent underlying most federal funding statutes because, when the federal government provides money to an entity in the form of a grant, the recipient is not normally expected to use the money for its own benefit, but rather receives it as part of a cooperative federal-state endeavor to benefit third parties. It was well-settled in the 1870s, as it is today, that the beneficiaries of a trust may sue the trustee for violations of its obligations. See *Duncan* v. *Jaudon*, 82 U.S. (15 Wall.) 165 (1872); *Oliver* v. *Piatt*, 44 U.S. (3 How.) 333 (1845); *Restatement (Second) of Trusts* §§ 197-199 (1957).

Fourth, even if a law passed pursuant to Congress's power under the Spending Clause is analogized to a contract, it is unlikely that Congress would have intended that the beneficiaries of the program be categorically barred from enforcing any rights accorded them under the law. Assuming *arguendo* that the relevant inquiry is the status of contract law at the time of Section 1983's enactment, rather than the prevailing law at the time the contract was made, third party beneficiaries of a contract traditionally were able to enforce rights granted under a contract, both in England and in the American courts, and that view predominated in 1873, when Section 1983 was enacted. See Peter Karsten, *The "Discovery" of Law by English and American Jurists of the Seventeenth, Eighteenth, and Nineteenth Centuries: Third-Party Beneficiary Contracts as a Test Case*, 9 Law and Hist. Rev. 327, 340-353 (1991); see also *id.* at 333 (courts permitted donee-beneficiaries to bring suit in 76% of reported Nineteenth Century cases).[10]

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deration proceeded from him, is, *that there is some property or thing in the hands of the defendant*, which is the consideration of the promise, held by the defendant *as a trust or a fund*."); Francis Hilliard, *The Law of Contracts* 426 (1872).

[10] In fact, the first American courts faced with the question applied the traditional English rule and held that, "when a promise is made to one, for the benefit of another, he for whose benefit it is made may bring an action for the breach." See Karsten, *supra*, at 340 (quoting *Schemerhorn* v. *Vanderheyden*, 1 Johns. (N.Y.) 139 (1806)). By 1859, seventeen American jurisdictions allowed third-party beneficiaries to sue, while only seven either did not or severely limited such suits. *Karsten*, *supra*, at 340; see also William W. Story, *A Treatise on the Law of Contracts Not Under Seal* 82 (1st ed. 1844) ("[I]n cases of simple contract, if one person make a promise to another for the benefit of a third, although no consideration move from such third person, it is binding, and either the party to whom it is made, or the party for whose benefit it is made may maintain an action upon it.").

Indeed, the most prominent and widely available contracts treatise at the time Congress enacted Section 1983[11] concluded that, "[i]n this country the right of a third party to bring an action on a promise made to another for his benefit seems to be somewhat more positively asserted [than in the English cases]; and perhaps it would be safe to consider this a prevailing rule with us." 1 Theophilus Parsons, *Law of Contracts* 390 (1st ed. 1853-1855) (footnote omitted). This Court appears to have shared that view. *Hendrick* v. *Lindsay*, 93 U.S. 143, 149 (1876) ("[T]he right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country.") (citing 1 Theophilus Parsons, *Law of Contracts* 467 (6th ed. 1873)).[12] And even those

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[11] See E. Allen Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 Mich. L. Rev. 1406, 1408-1409 (1987); Karsten, *supra*, at 353 n.150.

[12] See also 1 Joseph Chitty, *A Treatise on Pleading and Parties to Actions* 3 (10th Amer. ed. 1847) ("If the instrument be not under seal, it seems to be a general principle, that the party, for whose sole benefit it is evidently made, may sue thereon in his own name, although the engagement be not directly to or with him."); 2 James Kent, *Commentaries on American Law* 464 (12th ed. 1873) (O.W. Holmes, ed.) ("But it is understood to be now settled that, in a case of simple contract, if one person makes a promise to another for the benefit of a third party, the third party may maintain an action upon it, though the consideration does not move from him."). There was less consensus concerning the law regarding third-party enforcement of contracts under seal. See Arthur L. Corbin,

treatise writers who argued that third party beneficiaries could not sue to enforce a contract acknowledged a number of contrary cases recognizing such a right.[13]

The Brief for the Council of State Governments as Amicus Curiae in *Blessing* (cited at 520 U.S. at 350 (Scalia & Kennedy, JJ., concurring)) argued that third-party beneficiaries had no right to enforce a contract. Most of the authorities that amicus relied on, however, postdate the enactment of Section 1983, see Amicus Br. at 10-11 (citing authorities from 1880 and 1887), and pertain to a period of time when some American courts briefly adopted a stricter view of privity requirements. See generally Karsten, *supra*, at 340-353. Even during that era, however, third party beneficiaries still generally could enforce their rights in other ways, most notably by bringing equitable claims. See Arthur L. Corbin, *Contracts for the Benefit of Third Persons*, 27 Yale L. J. 1008, 1020-1022 (1918); see also *Karsten*, *supra*, 335-337, 366-368 & nn. 37-49 (citing and discussing the English cases).

At a minimum, the law governing the enforcement of contracts by third-party beneficiaries in 1873 did not so clearly

Contracts for the Benefit of Third Persons, 27 Yale L. J. 1008, 1019 (1918) (noting that "there is much authority" for the proposition that third-party beneficiaries could sue to enforce a contract under seal, but "many" courts "refus[e] to recognize a right in the beneficiary" of such a contract). Generally speaking, a contract "under seal" was a written commitment, to which the promisor's seal was affixed, that became irrevocable upon delivery to the promisee, regardless of whether there was consideration or agreement by the promisee. *Restatement (First) of Contracts* §§ 97, 102, 110 (1932).

[13] See Theron Metcalf, *Principles of the Law of Contracts, as Applied by the Courts of Law* 206 (Boston 1868, 1872) ("There are, however, many cases of simple contracts in which it has been decided, that where a person made a promise to another, for the benefit of a third, the third might maintain an action upon it, though the consideration did not move from him"); Hilliard, *supra*, at 426-427 ("many cases in the books, which must be regarded as maintaining the general proposition, that one party, for whose benefit a promise has been made to another, may himself maintain an action against the promisor").

bar such enforcement as to justify overruling more than two decades of precedent from this Court under Section 1983, which Congress itself has endorsed. See 42 U.S.C. 1320a-2, 1320a-10.[14]

B. Recognizing A Section 1983 Action Would Frustrate The Enforcement Mechanisms Congress Provided In FERPA

Even if FERPA creates substantive private rights of the sort that would otherwise be judicially enforceable, an action under Section 1983 is not available if Congress has explicitly or impliedly foreclosed that avenue of relief, such that a Section 1983 action would be "incompatible," *Blessing*, 520 U.S. at 341, or "inconsistent with" the "statutory framework," *Golden State*, 493 U.S. at 107. See also *Robinson*, 468 U.S. at 1009-1013; *Sea Clammers*, 453 U.S. at 13-20. Where, as here, Congress has not explicitly foreclosed a Section 1983 action, the determination whether the statute impliedly precludes such enforcement requires a careful and context-specific analysis of the overall structure and intended operation of the federal law, keeping in mind the impact the action would have on achievement of the statutory purposes. The inquiry, moreover, should not be wholly divorced from the question of whether the statute creates individually enforceable rights. Because the "key to the [Section 1983] inquiry is the intent of the legislature," *Sea Clammers*, 453 U.S. at 13; see also *Smith*, 468 U.S. at 1012, the less clear the evidence that Congress intended to create private rights, the more carefully the court should scrutinize the impact of a Section 1983 action on the enforcement mechanisms that

[14] See *Second National Bank* v. *Grand Lodge*, 98 U.S. 123, 124 (1878) (concluding that although "[n]o doubt the general rule is that * * * privity must exist," there are "confessedly many exceptions to it"); Bishop, *supra*, § 468 (finding "plenty of decisions denying the right of the third party to recover, and plenty of others in which the right was maintained").

Congress expressly provided. Furthermore, inherent in the question of whether a particular statute creates a new substantive federal right is what the scope of that right is—a question that necessarily imports considerations of remedy and relief. In this case, recognition of a private right of action—especially for damages—would frustrate rather than further the enforcement scheme Congress established in FERPA.

This Court has made clear that the federal funding agency's "generalized powers" to audit the conduct of the funding recipient and terminate federal funds are insufficient to foreclose a cause of action under Section 1983. See *Blessing*, 520 U.S. at 347-348; *Wilder*, 496 U.S. at 521; *Wright*, 479 U.S. at 428. In *Blessing*, for example, the Court found it significant that, unlike the federal programs at issue in *Sea Clammers* and *Robinson*, Title IV-D of the Social Security Act "contain[ed] no private remedy—either judicial or administrative—through which aggrieved persons can seek redress." 520 U.S. at 348. In addition, in *Wilder*, 496 U.S. at 523, the Court ruled that state administrative review procedures were insufficient to foreclose Section 1983 enforcement. See also *Wright*, 479 U.S. at 522 (Section 1983 action found, in part, because "HUD has not provided any formal procedure for tenants to bring to HUD's attention alleged [Public Housing Authority] failures to abide by the Brooke Amendment and HUD regulations").

FERPA provides the individualized, federal review mechanism that was missing in *Blessing*, *Wilder*, and *Wright*. First, Congress vested the Secretary of Education with substantially more authority over funding recipients than just the power to audit and the severe and inflexible (and thus rarely used) sanction of funding termination. Congress expressly commanded the Secretary—not the courts—to "take appropriate actions" to "enforce" FERPA and "to deal with violations" of its terms. 20 U.S.C. 1232g(f). To

that end, Congress armed the Secretary with the power and discretion to enforce FERPA by issuing a complaint to compel compliance through a cease-and-desist order, recovering funds improperly spent, withholding further payments to the educational institution, entering into a compliance agreement, or "tak[ing] any other action authorized by law," including suing for enforcement of FERPA's requirements. 20 U.S.C. 1234a, 1234c(a)(4), 1234e; 34 C.F.R. 99.67(a); see also *United States* v. *Miami Univ.*, 91 F. Supp. 2d 1132 (S.D. Ohio 2000), appeal pending, No. 00-3518 (6th Cir.).

Second, Congress directed the Secretary to establish both an office and a review board "within the Department" for the purpose of "investigating, processing, reviewing, and adjudicating" individual complaints "alleg[ing]" that an educational institution has violated FERPA. 20 U.S.C. 1232g(g). The Secretary has designated the Department's Family Policy Compliance Office (Compliance Office) as the office responsible for carrying out those responsibilities in the first instance. See 34 C.F.R. 99.60(a) and (b).

The Secretary's administrative review scheme allows parents or students to file with the Compliance Office a written complaint, 34 C.F.R. 99.63, containing "specific allegations of fact giving reasonable cause to believe" that a violation of FERPA has occurred, 34 C.F.R. 99.64(a). The Secretary has established a limitations period of 180 days for filing such complaints. 34 C.F.R. 99.64(c). If the complaint is timely and contains the required information, the Compliance Office will initiate an investigation, 34 C.F.R. 99.64(b), notify the educational institution of the charge, and request a written response, 34 C.F.R. 99.65. After receiving the response, the Office may entertain "further written or oral arguments or information." 34 C.F.R. 99.66(a). If the Office finds a violation, it provides to both the complainant and the educational institution a notice of its factual findings and a "statement of the specific steps that the agency or institution must take to

comply" with FERPA. 34 C.F.R. 99.66(b) and (c)(1). In addition, the Office must provide "a reasonable period of time" under the circumstances "during which the educational agency or institution may comply voluntarily." 34 C.F.R. 99.64(c)(2).

If voluntary compliance is not achieved, the Secretary may initiate formal proceedings to compel compliance with FERPA and to order appropriate relief, such as a cease-and-desist order. See 34 C.F.R. 81.3, 99.67; see generally 34 C.F.R. Pt. 81, subpt. A (describing proceedings).[15] Those enforcement actions may be appealed to the Office of Administrative Law Judges—which the Secretary has designated as the review board required by FERPA Section 1232g(f). See 34 C.F.R. 99.60(c). An administrative law judge (ALJ) will conduct a hearing on the record, with the particularized application of evidentiary rules and discovery proceedings, as the ALJ deems appropriate. 34 C.F.R. 81.15-81.16. The parties—the fund recipient and the authorized Department official, see 34 C.F.R. 81.2—may be represented by counsel. 34 C.F.R. 81.8. The ALJ may allow a non-party, such as a private individual who has filed a complaint under FERPA, to participate in the proceedings to the extent such participation will aid disposition of the case. 34 C.F.R. 81.7. The ALJ, however, may place "appropriate limits" on that participation to ensure the efficient conduct of the proceedings. 34 C.F.R. 81.7(d)(2).

Thus, the individualized review accorded complaints filed with the Secretary's Compliance Office—under which it

[15] The Department of Education has informed us that, in FERPA's nearly three decades of operation, the statutory preference for cooperation and voluntary compliance has proved sufficient to enforce FERPA. With the exception of one case currently pending against Miami University, see 91 F. Supp. 2d 1132 (S.D. Ohio 2000), the Secretary has not found it necessary to resort to more formal enforcement measures, such as a cease-and-desist order.

investigates the facts, applies law to those facts, arrives at a decision, seeks voluntary compliance, and, if necessary, institutes formal enforcement proceedings to compel compliance —fairly approximates the individualized consideration that plaintiffs seek under Section 1983. At the same time, it affords claimants the benefits of both the Secretary's expertise and more prompt and informal procedures, while enabling the Secretary to screen complaints and protect fund recipients from unwarranted formal adjudications. That enforcement mechanism should be regarded as exclusive.[16]

Recognition of a private cause of action under Section 1983 would, in many ways, duplicate and frustrate the thoroughgoing administrative system that Congress prescribed —and that respondent never invoked. FERPA's focus on relatively informal adjudication and voluntary compliance in the first instance—an approach that has proven extremely successful in practice—would be overridden whenever a person claiming a violation of FERPA elects the necessarily adversarial approach of a privately initiated lawsuit. The substantial discretion that Congress and the regulations vest

[16] Consistent with that understanding, Senator Buckley, the architect of FERPA, submitted into the Congressional Record a question-and-answer exchange that strongly indicated that, in the absence of an express private right of action, administrative review was "the only means of enforcement" available for FERPA:

> 14. Is a right of private action created to enforce the Act or is the HEW compliance mechanism created by the Act the only means of enforcement?
>
> 14. A right of private action was intended in the Buckley amendment by reference to another part of the Senate bill. However, the Conference did not accept the complete language of the referred-to Senate provision, and the explicit right of private action is no longer in the law at this time. However, it may be interesting to note that the national PTA and the League of Women Voters are considering establishing monitoring activities to review and seek compliance with this law.

120 Cong. Rec. 36,534 (1974) (Sen. Curtis, on behalf of Sen. Buckley).

in the Secretary in reviewing individual complaints, initiating any necessary enforcement actions, selecting appropriate enforcement measures and remedies, and determining the appropriate extent of participation by private individuals in enforcement proceedings, could be trumped by the decision of any individual parent or student to file suit.

Significantly, moreover, FERPA provides that, "[e]xcept for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices" of the Department of Education. 20 U.S.C. 1232g(g). Congress mandated such centralized review and enforcement because, given FERPA's expansive coverage of every public school student and many private school students—including approximately 58 million potential 1983 plaintiffs in public schools[17]—it was quite "concern[ed] that regionalizing the enforcement of the law may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions." 120 Cong. Rec. 39,863 (1974) (Joint Statement); H.R. Conf. Rep. No. 1619, *supra*, at 11 (FERPA amendment "prohibits the regionalization of the enforcement of [FERPA]"); S. Conf. Rep. No. 1409, 93d Cong., 2d Sess. 11 (1974) (same); 120 Cong. Rec. 36,528 (1974) (Sen. Curtis) (Compliance Office "will serve as the focal point for investigating, processing, and reviewing violations of the Act"). It is implausible to suppose that the same Congress that feared balkanization of FERPA by regional offices of the Department of Education—all of which fall under the direct control of the Secretary—simultaneously intended to consign control over FERPA's interpretation to thousands of federal and state court judges and juries across the

[17] Thomas D. Synder & Charlene M. Hoffman, Nat'l Ctr. for Educ. Statistics, *Digest of Education Statistics* 52-53, 204 (forthcoming April 2002); see also 120 Cong. Rec. 39,862 (1974) (Joint Statement) (noting that FERPA "could possibly apply to each of the thousands of school districts and colleges across the nation").

country. Contrast *Wilder*, 496 U.S. at 505, 522 (Section 1983 action recognized where Congress's intent was to decentralize administration by reducing the federal role in rate-setting and enhancing the role of state and local governments). In short, Congress has textually identified who it wants to "enforce" FERPA and "deal with" complaints "alleg[ing] violations" of the Act—and that is the Secretary of Education, not private plaintiffs. 20 U.S.C. 1232g(f) and (g).[18]

Finally, the FERPA right claimed here is, at its core, the right to require fund recipients to comply with the conditions imposed on their receipt of federal funds. With respect to the Secretary's powers, the statute and implementing regulations identify prospective relief, such as a cease-and-desist order, as the appropriate enforcement tool, with the exception of the recovery of grant funds in certain circumstances. A cause of action under Section 1983 for damages for a violation of FERPA would be inconsistent with that remedial scheme. Indeed, most of the prior cases in which this Court recognized a private action under Section 1983 to enforce rights created by Spending Clause legislation sought only prospective injunctive relief. See *Blessing*, 520 U.S. at 337; *Wilder*, 496 U.S. at 504 & n.4; *Thiboutot*, 448 U.S. at 3; see also *Suter*, 503 U.S. at 352; *Rosado* v. *Wyman*, 397 U.S. 397, 421 (1970); cf. *Edelman* v. *Jordan*, 415 U.S. 651, 677 (1974) ("Though a § 1983 action may be instituted by public aid

[18] FERPA thus stands in sharp contrast to statutes like Title VI and Title IX, where (1) the evidence of congressional intent to create individually enforceable rights was so compelling as to support implied rights of action, (2) enforcement authority is spread across multiple federal agencies (there are approximately 25 agencies that have Title VI and Title IX enforcement authority), and (3) regional and decentralized enforcement is often utilized. See, *e.g.*, 65 Fed. Reg. 52,858, 52,860, 52,858 n.2 (2000); 65 Fed. Reg. 76,462 (2000); U.S. Comm'n on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs* 6-7 (1996).

recipients" to enforce compliance with the conditions imposed on federal funding, "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex parte Young*, *supra*, and may not include a retroactive award which requires the payment of funds from the state treasury.").[19]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2002

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[19] In this case, the Washington Supreme Court upheld an award of punitive as well as compensatory damages. Pet. App. 28a, 36a. This Court will address the availability of punitive damages for an implied right of action to enforce the provisions of Spending Clause legislation (the Rehabilitation Act) in *Barnes* v. *Gorman*, No. 01-682.

APPENDIX

Statutory and Regulatory Provisions

The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (1994 & Supp. V 1999) provides:

§ 1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an

institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an

educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; record-keeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C)(i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under

the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted—

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if—

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.[1]

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the

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[1] So in original. The period probably should be a semicolon.

purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of Title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J)(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the

existence or contents of the subpoena or any information furnished in response to the subpoena.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with

the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding—

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(7)(A) Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 14071 of Title 42 concerning registered sex offenders who are required to register under such section.

(B) The Secretary shall take appropriate steps to notify educational institutions that disclosure of information described in subparagraph (A) is permitted.

(c) Surveys or data-gathering activities; regulations

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education

agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be

filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Disciplinary records; disclosure

Nothing in this section shall prohibit an educational agency or institution from—

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this chapter [20 U.S.C.A. § 1221 et seq.] or chapter 28 of this title [20 U.S.C.A. § 1001 et seq.] shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if—

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a).

(j) Investigation and prosecution of terrorism

(1) In general

Notwithstanding subsections (a) through (i) or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General (or his designee) to—

(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g) (5)(B) of Title 18, or an act of domestic or international terrorism as defined in section 2331 of that title; and

(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records, consistent with such guide-

lines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

(2) Application and approval

(A) In general

An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain information described in paragraph (1)(A).

(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).

(3) Protection of educational agency or institution

An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.

(4) Record-keeping

Subsection (b)(4) of this section does not apply to education records subject to a court order under this subsection.

34 C.F.R. Part 99 provides:

34 C.F.R. § 99.1:

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) Except as otherwise noted in § 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if—

(1) The educational institution provides educational services or instruction, or both, to students; or

(2) The educational agency is authorized to direct and control public elementary or secondary, or post-secondary educational institutions.

(b) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(c) The Secretary considers funds to be made available to an educational agency or institution of funds under one or more of the programs referenced in paragraph (a) of this section—

(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or

(2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed

Student Loan Program (Titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(d) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

34 C.F.R. § 99.2:

§ 99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 444 of the General Education Provisions Act, as amended.

34 C.F.R. § 99.3:

§ 99.3 What definitions apply to these regulations?

The following definitions apply to this part:

Act means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 444 of the General Education Provisions Act.

Attendance includes, but is not limited to:

(a) Attendance in person or by correspondence; and

(b) The period during which a person is working under a work-study program.

Dates of attendance.

(a) The term means the period of time during which a student attends or attended an educational agency or

institution. Examples of dates of attendance include an academic year, a spring semester, or a first quarter.

(b) The term does not include specific daily records of a student's attendance at an educational agency or institution.

Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.

Disciplinary action or proceeding means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means.

Educational agency or institution means any public or private agency or institution to which this part applies under § 99.1(a).

Education records.

(a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8.

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution.

Eligible student means a student who has reached 18 years of age or is attending an institution of postsecondary education.

Institution of postsecondary education means an institution that provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

Party means an individual, agency, institution, or organization.

Personally identifiable information includes, but is not limited to:

(a) The student's name;

(b) The name of the student's parent or other family member;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number or student number;

(e) A list of personal characteristics that would make the student's identity easily traceable; or

(f) Other information that would make the student's identity easily traceable.

Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.

Secretary means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

Student, except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

34 C.F.R. § 99.4:

§ 99.4 What are the rights of parents?

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

34 C. F. R. § 99.5:

§ 99.5 What are the rights of students?

(a) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) An individual who is or has been a student at an educational institution and who applies for admission at another component of that institution does not have rights under this part with respect to records maintained by that other component, including records maintained in connection with the student's application for admission, unless the student is accepted and attends that other component of the institution.

34 C.F.R. § 99.6:

§ 99.6 [Reserved]

34 C.F.R. § 99.7

§ 99.7 What must an educational agency or institution include in its annual notification?

(a)(1) Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act and this part.

(2) The notice must inform parents or eligible students that they have the right to—

(i) Inspect and review the student's education records;

(ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;

(iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and § 99.31 authorize disclosure without consent; and

(iv) File with the Department a complaint under §§ 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of the Act and this part.

(3) The notice must include all of the following:

(i) The procedure for exercising the right to inspect and review education records.

(ii) The procedure for requesting amendment of records under § 99.20.

(iii) If the educational agency or institution has a policy of disclosing education records under § 99.31(a)(1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

(b) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights.

(1) An educational agency or institution shall effectively notify parents or eligible students who are disabled.

(2) An agency or institution of elementary or secondary education shall effectively notify parents who have a primary or home language other than English.

34 C.F.R. § 99.8:

§ 99.8 What provisions apply to records of a law enforcement unit?

(a)(1) Law enforcement unit means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to—

(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution.

(2) A component of an educational agency or institution does not lose its status as a law enforcement unit if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

(b)(1) Records of a law enforcement unit means those records, files, documents, and other materials that are—

(i) Created by a law enforcement unit;

(ii) Created for a law enforcement purpose; and

(iii) Maintained by the law enforcement unit.

(2) Records of a law enforcement unit does not mean—

(i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a com-

ponent of the educational agency or institution other than the law enforcement unit; or

(ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.

(c)(1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.

(2) Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act, including the disclosure provisions of § 99.30, while in the possession of the law enforcement unit.

(d) The Act neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records.

34 C.F.R. § 99.10:

§ 99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under § 99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records. This provision applies to—

(1) Any educational agency or institution; and

(2) Any State educational agency (SEA) and its components.

(i) For the purposes of subpart B of this part, an SEA and its components constitute an educational agency or institution.

(ii) An SEA and its components are subject to subpart B of this part if the SEA maintains education records on students who are or have been in attendance at any school of an educational agency or institution subject to the Act and this part.

(b) The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

(c) The educational agency or institution, or SEA or its component shall respond to reasonable requests for explanations and interpretations of the records.

(d) If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall—

(1) Provide the parent or eligible student with a copy of the records requested; or

(2) Make other arrangements for the parent or eligible student to inspect and review the requested records.

(e) The educational agency or institution, or SEA or its component shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an education agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of "Education records" in § 99.3, the student may have those records

reviewed by a physician or other appropriate professional of the student's choice.

34 C.F.R. § 99.11:

§ 99.11 May an educational agency or institution charge a fee for copies of education records?

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

34 C.F.R. § 99.12:

§ 99.12 What limitations exist on the right to inspect and review records?

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.

(b) A postsecondary institution does not have to permit a student to inspect and review education records that are:

(1) Financial records, including any information those records contain, of his or her parents;

(2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and

(3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if:

(i) The student has waived his or her right to inspect and review those letters and statements; and

(ii) Those letters and statements are related to the student's:

(A) Admission to an educational institution;

(B) Application for employment; or

(C) Receipt of an honor or honorary recognition.

(c)(1) A waiver under paragraph (b)(3)(i) of this section is valid only if:

(i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and

(ii) The waiver is made in writing and signed by the student, regardless of age.

(2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall:

(i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and

(ii) Use the letters and statements of recommendation only for the purpose for which they were intended.

(3)(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.

(ii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

(Authority: 20 U.S.C. 1232g(a)(1)(A), (B), (C), and (D))

34 C.F.R. § 99.20:

§ 99.20 How can a parent or eligible student request amendment of the student's education records?

(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record.

(b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

(c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.

34 C.F.R. § 99.21:

§ 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy rights of the student.

(b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall:

(i) Amend the record accordingly; and

(ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall:

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

34 C.F.R. § 99.22:

§ 99.22 What minimum requirements exist for the conduct of a hearing?

The hearing required by § 99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

34 C.F.R. § 99.30:

§ 99.30 Under what conditions is prior consent required to disclose information?

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31.

(b) The written consent must:

(1) Specify the records that may be disclosed;
(2) State the purpose of the disclosure; and

(3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section:

(1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and

(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provided the student with a copy of the records disclosed.

34 C.F.R. § 99.31:

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll.

(3) The disclosure is, subject to the requirements of § 99.35, to authorized representatives of—

(i) The Comptroller General of the United States;

(ii) The Attorney General of the United States;

(iii) The Secretary; or

(iv) State and local educational authorities.

(4)(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to:

(A) Determine eligibility for the aid;

(B) Determine the amount of the aid;

(C) Determine the conditions for the aid; or

(D) Enforce the terms and conditions of the aid.

(ii) As used in paragraph (a)(4)(i) of this section, "financial aid" means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(5)(i) The disclosure is to State and local officials or authorities to whom this information is specifically—

(A) Allowed to be reported or disclosed pursuant to State statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or

(B) Allowed to be reported or disclosed pursuant to State statute adopted after November 19, 1974, subject to the requirements of § 99.38.

(ii) Paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type of State or local officials to whom disclosures may be made under that paragraph.

(6)(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to:

(A) Develop, validate, or administer predictive tests;

(B) Administer student aid programs; or

(C) Improve instruction.

(ii) The agency or institution may disclose information under paragraph (a)(6)(i) of this section only if:

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization; and

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted.

(iii) If this Office determines that a third party outside the educational agency or institution to whom information is disclosed under this paragraph (a)(6) violates paragraph (a)(6)(ii)(B) of this section, the educational agency or institution may not allow that third party access to

personally identifiable information from education records for at least five years.

(iv) For the purposes of paragraph (a)(6) of this section, the term "*organization*" includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents, as defined in § 99.3, of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986.

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with—

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

(iii)(A) If an educational agency or institution initiates legal action against a parent or student, the educational agency or institution may disclose to the court, without a

court order or subpoena, the education records of the student that are relevant for the educational agency or institution to proceed with the legal action as plaintiff.

(B) If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.

(11) The disclosure is information the educational agency or institution has designated as "directory information", under the conditions described in § 99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(13) The disclosure, subject to the requirements in § 99.39, is to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. The disclosure may only include the final results of the disciplinary proceeding conducted by the institution of postsecondary education with respect to that alleged crime or offense. The institution may disclose the final results of the disciplinary proceeding, regardless of whether the institution concluded a violation was committed.

(14)(i) The disclosure, subject to the requirements in § 99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that—

(A) The student is an alleged perpetrator of a crime of violence or non- forcible sex offense; and

(B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

(ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.

(iii) This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.

(15)(i) The disclosure is to a parent of a student at an institution of postsecondary education regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if—

(A) The institution determines that the student has committed a disciplinary violation with respect to that use or possession; and

(B) The student is under the age of 21 at the time of the disclosure to the parent.

(ii) Paragraph (a)(15) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from disclosing information.

(b) Paragraph (a) of this section does not forbid an educational agency or institution from disclosing, nor does it require an educational agency or institution to disclose, personally identifiable information from the education records of a student to any parties under paragraphs (a)(1) through (11), (13), (14), and (15) of this section.

34 C.F.R. § 99.32:

§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?

(a)(1) An educational agency or institution shall maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student.

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include:

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(b) If an educational agency or institution discloses personally identifiable information from an education record with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include:

(1) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(2) The legitimate interests under § 99.31 which each of the additional parties has in requesting or obtaining the information.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.

(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in § 99.31(a) (1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to:

(1) The parent or eligible student;

(2) A school official under § 99.31(a)(1);

(3) A party with written consent from the parent or eligible student;

(4) A party seeking directory information; or

(5) A party seeking or receiving the records as directed by a Federal grand jury or other law enforcement subpoena and the issuing court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

34 C.F.R. § 99.33:

§ 99.33 What limitations apply to the redisclosure of information?

(a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this

section may use the information, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if:

(1) The disclosures meet the requirements of § 99.31; and

(2) The educational agency or institution has complied with the requirements of § 99.32(b).

(c) Paragraph (a) of this section does not apply to disclosures made to parents of dependent students under § 99.31(a)(8), to disclosures made pursuant to court orders, lawfully issued subpoenas, or litigation under § 99.31(a)(9), to disclosures of directory information under § 99.31(a)(11), to disclosures made to a parent or student under § 99.31(a)(12), to disclosures made in connection with a disciplinary proceeding under § 99.31(a)(14), or to disclosures made to parents under § 99.31(a)(15).

(d) Except for disclosures under § 99.31(a)(9), (11), and (12), an educational agency or institution shall inform a party to whom disclosure is made of the requirements of this section.

(e) If this Office determines that a third party improperly rediscloses personally identifiable information from education records in violation of § 99.33(a) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

34 C.F.R. § 99.34:

§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

(a) An educational agency or institution that discloses an education record under § 99.31(a)(2) shall:

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:

(i) The disclosure is initiated by the parent or eligible student; or

(ii) The annual notification of the agency or institution under § 99.6 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll;

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under Subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if—

(1) The student is enrolled in or receives services from the other agency or institution; and

(2) The disclosure meets the requirements of paragraph (a) of this section.

34 C.F.R. § 99.35:

§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

(a) The officials listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs.

(b) Information that is collected under paragraph (a) of this section must:

(1) Be protected in a manner that does not permit personal identification of individuals by anyone except the officials referred to in paragraph (a) of this section; and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if:

(1) The parent or eligible student has given written consent for the disclosure under § 99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

34 C.F.R. § 99.36:

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) Nothing in this Act or this part shall prevent an educational agency or institution from—

(1) Including in the education records of a student appropriate information concerning disciplinary action taken

against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community;

(2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or

(3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.

(c) Paragraphs (a) and (b) of this section will be strictly construed.

34 C.F.R. § 99.37:

§ 99.37 What conditions apply to disclosing directory information?

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without meeting the conditions in paragraph (a) of this section.

34 C.F.R. § 99.38:

§ 99.38 What conditions apply to disclosure of information as permitted by State statute adopted after November 19, 1974 concerning the juvenile justice system?

(a) If reporting or disclosure allowed by State statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under § 99.31(a)(5)(i)(B).

(b) The officials and authorities to whom the records are disclosed shall certify in writing to the educational agency or institution that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student.

34 C.F.R. § 99.39:

§ 99.39 What definitions apply to the nonconsensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings concerning crimes of violence or non-forcible sex offenses?

As used in this part:

Alleged perpetrator of a crime of violence is a student who is alleged to have committed acts that would, if proven, constitute any of the following offenses or attempts to commit the following offenses that are defined in appendix A to this part:

Arson

Assault offenses

Burglary

Criminal homicide—manslaughter by negligence

Criminal homicide—murder and nonnegligent manslaughter

Destruction/damage/vandalism of property

Kidnapping/abduction

Robbery

Forcible sex offenses.

Alleged perpetrator of a nonforcible sex offense means a student who is alleged to have committed acts that, if proven, would constitute statutory rape or incest. These offenses are defined in appendix A to this part.

Final results means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student.

Sanction imposed means a description of the disciplinary action taken by the institution, the date of its imposition, and its duration.

Violation committed means the institutional rules or code sections that were violated and any essential findings supporting the institution's conclusion that the violation was committed.

34 C.F.R. § 99.60:

§ 99.60 What functions has the Secretary delegated to the Office and to the Office of Administrative Law Judges?

(a) For the purposes of this subpart, "*Office*" means the Family Policy Compliance Office, U.S. Department of Education.

(b) The Secretary designates the Office to:

(1) Investigate, process, and review complaints and violations under the Act and this part; and

(2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Office of Administrative Law Judges to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs. The term "*applicable program*" is defined in section 400 of the General Education Provisions Act.

34 C.F.R. § 99.61:

§ 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it shall notify the Office within 45 days, giving the text and citation of the conflicting law.

34 C.F.R. § 99.62:

§ 99.62 What information must an educational agency or institution submit to the Office?

The Office may require an educational agency or institution to submit reports containing information necessary to resolve complaints under the Act and the regulations in this part.

34 C.F.R. § 99.63:

§ 99.63 Where are complaints filed?

A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, DC 20202-4605.

34 C.F.R. § 99.64:

§ 99.64 What is the complaint procedure?

(a) A complaint filed under § 99.63 must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred.

(b) The Office investigates each timely complaint to determine whether the educational agency or institution has failed to comply with the provisions of the Act or this part.

(c) A timely complaint is defined as an allegation of a violation of the Act that is submitted to the Office within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation.

(d) The Office may extend the time limit in this section for good cause shown.

34 C.F.R. § 99.65:

§ 99.65 What is the content of the notice of complaint issued by the Office?

(a) The Office notifies the complainant and the educational agency or institution in writing if it initiates an investigation of a complaint under § 99.64(b). The notice to the educational agency or institution—

(1) Includes the substance of the alleged violation; and

(2) Asks the agency or institution to submit a written response to the complaint.

(b) The Office notifies the complainant if it does not initiate an investigation of a complaint because the complaint fails to meet the requirements of § 99.64.

34 C.F.R. § 99.66:

§ 99.66 What are the responsibilities of the Office in the enforcement process?

(a) The Office reviews the complaint and response and may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant and the educational agency or institution written notice of its findings and the basis for its findings.

(c) If the Office finds that the educational agency or institution has not complied with the Act or this part, the notice under paragraph (b) of this section:

(1) Includes a statement of the specific steps that the agency or institution must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily.

34 C.F.R. § 99.67:

§ 99.67 How does the Secretary enforce decisions?

(a) If the educational agency or institution does not comply during the period of time set under § 99.66(c), the Secretary may, in accordance with part E of the General Education Provisions Act—

(1) Withhold further payments under any applicable program;

(2) Issue a compliant to compel compliance through a cease-and-desist order; or

(3) Terminate eligibility to receive funding under any applicable program.

(b) If, after an investigation under § 99.66, the Secretary finds that an educational agency or institution has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution written notice of the decision and the basis for the decision.

Supreme Court, U.S.
FILED
FEB 22 2002
CLERK

No. 01-679

In the
Supreme Court of the United States

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
Petitioners,
v.
JOHN DOE,
Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE STUDENT PRESS LAW CENTER, SOCIETY OF PROFESSIONAL JOURNALISTS, AND SECURITY ON CAMPUS, INC., IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The privacy interest addressed in FERPA does not rise to the level of a "right" that can be vindicated by a § 1983 claim. 3

A. Applying § 1983 to FERPA is inconsistent with the history and tradition of 1983 claims. 6

1. The origins of § 1983 6

2. Expansion to cover statutory rights 8

3. Differentiating systemwide obligations from individual rights 10

4. How FERPA fits within the § 1983 framework. 13

B. This case provides the court with the opportunity to determine what level of privacy "interest" identified by Congress rises to the level of a justification for a 1983 civil rights claim. 17

C. When Congress intends to create an enforceable privacy interest, it explicitly does so. 19

II. Allowing § 1983 claims under a federal statute like FERPA will undermine state action to protect citizens' interests and lead to greater government secrecy by undermining state open records laws. 21

A. Allowing remedies beyond government revocation of funds will have sweeping consequences. 21

B. Making public policy decisions by balancing privacy and access interests has traditionally been and is appropriately left to state legislatures. 23

C. Eliminating this balancing of interests would have a drastic effect on public access to campus crime information. 25

CONCLUSION 29

TABLE OF AUTHORITIES

Cases:

Anderson v. Creighton, 483 U.S. 635 (1987) 17

Blessing v. Freestone, 520 U.S. 329 (1997) . 12-13, 16-17

District of Columbia v. Carter, 409 U.S. 418 (1973) . . 6, 8

Hague v. CIO, 307 U.S. 496 (1939) 7

Jackson v. Gates, 975 F.2d 648 (9th Cir. 1992) *cert. denied*, 113 S.Ct. 2996 (1993) 17

Maine v. Thiboutot, 448 U.S. 1 (1981) 7-8

Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1 (1981) 8

Monroe v. Pape, 365 U.S. 167 (1961) 6, 8

Owasso Independent School District v. Falvo, 534 U.S. ___ (2002), *reversing* 233 F.3d 1203 (10th Cir. 2001) . 5, 24

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981) 8-10, 18

State ex rel. The Miami Student v. Miami University, 79 Ohio St.3d 168, 680 N.E.2d 956 (1997) 22, 26-28

Suter v. Artist M., 503 U.S. 347 (1992) 10-16

Tombrello v. USX Corporation, 763 F.Supp. at 545 15

U.S. v. Miami University, 91 F.Supp.2d 1132 (2000) 22, 23, 28

U.S. v. Miami University, No. 00-3518 (6th Cir. filed April 27, 2000) 22

Valdez v. McPheters, 172 F.3d 1220 (10th Cir. 1999) . . . 17

Whalen v. Roe, 429 U.S. 589 (1977) 19

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5 U.S.C. § 552a(b) (2002) (Privacy Act of 1974) 20

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15 U.S.C. §1681 (2002) (Fair Credit Reporting Act of 1970) 20

18 U.S.C. §1681r (2002) (enforcement provisions of FCRA) 20, 21

18 U.S.C. § 2721 (2002) (Drivers Privacy Protection Act of 1994) 20

18 U.S.C. § 2724 (2002) (enforcement provisions of DPPA) 20, 21

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INTEREST OF *AMICI CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interest of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Student Press Law Center is a national, non-profit, non-partisan organization established in 1974 to perform legal research and provide information and advocacy for the purpose of promoting and preserving the free press rights of student journalists. As the only national organization in the country devoted exclusively to this purpose, the SPLC has collected information on student media cases nationwide and has submitted amicus curiae briefs in numerous cases before state and federal courts.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

Security On Campus, Inc., is the only national non-profit organization devoted exclusively to the prevention of college and university campus violence and other crimes. Since SOC's founding in 1987 by Connie and Howard Clery, whose daughter Jeanne was raped and murdered on campus, SOC has sought to make campuses safer by ensuring that students are made aware of crimes and other dangers to their safety on campus. SOC's efforts have been the impetus for numerous state and federal laws that disclose greater campus crime information to members of the public, including current and prospective students. SOC is based in King of Prussia, Pennsylvania.

Amici's interests in this case lie in its potentially sweeping implications for newsgathering, reporting and public disclosure. Federal laws designed to limit disclosure of information affect what the public can learn about its government and other institutions, particularly when they are enforced in such a way that will make state governments err on the side of nondisclosure in the face of civil rights suits.

SUMMARY OF ARGUMENT

The Family Educational Rights and Privacy Act ("FERPA") imposes a requirement on educational institutions: if they wish to receive federal funds, they cannot have a "policy or practice" of releasing certain student records. This requirement does not create a "right" sufficient to serve as the basis of a civil rights suit under 42 U.S.C. § 1983, but rather recognizes a "systemwide" interest by Congress in records disclosure issues.

Privacy rights that can be vindicated under § 1983 must rise to the level of *constitutional* privacy violations — illegal

intrusion into homes by state agents, for example. A law enacted by Congress with the goal of requiring secrecy in certain records does not create a constitutional right, and the statutory interest recognized fails to meet this court's standards to justify a civil rights suit.

The judgment of the Washington Supreme Court finding that FERPA "rights" can be vindicated under § 1983 should be overturned, to avoid the consequences of allowing federal statutes like FERPA from wiping out years of work by state legislatures to balance privacy interests against the public need for information about its government and institutions.

ARGUMENT

I. The privacy interest addressed in FERPA does not rise to the level of a "right" that can be vindicated by a § 1983 claim.

The Civil Rights Act of 1871 included a provision, currently codified at 42 U.S.C. § 1983, that allows for private suits against state actors[2] who deprive individuals of "any rights, privileges or immunities secured by the Constitution and laws." The impact of this provision has grown exponen-

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[2]In the evolution of § 1983 suits, courts have required a state actor to infringe on a specific right under the color of law. Here, the "actor" is a private university. The question was raised below whether a private university would qualify as a state actor for purposes of FERPA. However, in granting the petition for certiorari, the Supreme Court did not take this question. Regardless of whether a private university would be presumed a state actor for purposes of FERPA, FERPA was not intended to create the kind of right that § 1983 was intended to protect.

tially over the last 130 years, allowing it to evolve from a barely used remedy for violations of constitutional rights by state officials, to the method of vindicating a range of specific statutory violations in federal courts. As applicability of § 1983 expanded to cover statutory violations, this Court developed standards for determining when a statute created an individual right that could be enforced through a civil rights lawsuit.

The most troublesome set of cases surely are those that revolve around violations of perceived "rights" of privacy. Privacy is a term that still defies easy definition.

While a final definition of this term is beyond the scope of this case, this Court is now being asked to define at what point a privacy interest becomes a "right" under § 1983. *Amici* propose that the answer is clear: Only those privacy interests that have been recognized as *constitutional* privacy rights properly justify § 1983 suits. This distinction is consistent with the history and purpose of § 1983, with its derivation from the Fourteenth Amendment, and with the public policy interests that would be jeopardized by an overly broad definition that would allow any privacy interest to reach the level of a protected "right."

Another factor that should inform the examination of privacy rights concerns exactly what type of information disclosure is at stake. In many cases, privacy advocates argue that information that has already been given to the government — and thus been removed from the truly private realm — should be kept secret by the government. This argument has merit for highly personal information that is required to be disclosed to a governmental body. But when the cloak of secrecy also covers the very information that governments use to make decisions, or that the public needs to inform its own

oversight of government or institutions, secrecy in the name of "privacy" becomes a dangerous tool that harms the public interest.

Such is the case here. Under FERPA, schools have been hesitant to release important campus crime information for fear of a complete loss of federal funds. Congress amended FERPA to address that problem, Higher Education Amendments of 1992, PL 102-325, §1155, 106 Stat 448 (1992), but the specter of massive civil rights litigation for violations over incidents such as discussing a future teacher's moral fitness, as in this case, or for having a student call out a grade in class, as in a case heard this term by this court and decided earlier this week, *Owasso Independent School District v. Falvo*, 534 U.S. ___ (2002), *reversing* 233 F.3d 1203 (10th Cir. 2001), will again lead to a clampdown on release of important public information. Section 1983, a law enacted as a sword of justice to remedy heinous crimes such as lynchings and home-burnings in the post-Civil War era, should not be fashioned into a bludgeon to deny the general public access to important information.

This court's standards make clear that while § 1983 applies to violations of laws, not just constitutional rights, those laws must nonetheless clearly create individual rights before they can serve as the basis for a civil rights claim. An examination of the development of that principle makes clear that the privacy interest addressed in FERPA does not create such rights. FERPA requires educational institutions to adopt a systemwide policy that protects privacy if they wish to receive federal education funds, but this Court has held that such a policy is quite distinct from an enforceable individual right.

A. Applying § 1983 to FERPA is inconsistent with the history and tradition of 1983 claims.

1. The origins of § 1983

42 U.S.C. § 1983 was originally introduced as § 1 of the Ku Klux Klan Act of 1871. *District of Columbia v. Carter*, 409 U.S. 418, 423-426 (1973) (citing the Act of April 20, 1871, §1, 17 Stat. 13). This legislation, which later became known as the Civil Rights Act of 1871, was one part of a series of civil rights laws created to address the growing terrorism of the Ku Klux Klan and prevent violent acts such as lynchings of African-Americans. Initially, § 1 of the Act "was designed primarily in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others." *Id.* at 426. After the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments, Congress enacted a series of civil rights statutes to assist in the enforcement of the new amendments because the amendments "alone would not secure equality for blacks or stop the atrocities committed against them." John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW, 644 (5th ed. 1995). *See also* Michele W. Homsey, *Employment Discrimination in The Public Sector: The Implied Repeal of Section 1983 by Title VII*, 15 LAB.LAW 509 (2000). The Civil Rights Act was intended to enforce rights created by the Fourteenth Amendment. *See Monroe v. Pape*, 365 U.S. 167, 171-72 (1961).

In 1874, Congress expanded the statute to apply to rights under the Constitution "and laws," when Congress consolidated the laws of the United States into a single volume under a new subject-matter arrangement. *See* 2 Cong.Rec. 827 (Jan. 21, 1874).

Section 1983 currently states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1983 (2001).

For nearly 70 years after its inception, § 1983 claims were rarely raised. *See Maine v. Thiboutot*, 448 U.S. 1, 27 (Justice Powell's dissent) ("One writer found only 21 cases decided under §1983 in the first 50 years of its history.").

The Supreme Court made one of its first modern interpretations of § 1983 in *Hague v. CIO*, 307 U.S. 496 (1939), holding that § 1983 may be used to enforce the right to assemble and distribute literature as a privilege and immunity of a citizen, as protected by the Fourteenth Amendment. *Hague* at 515 (1939). Like *Hague*, the cases that began raising §1983 claims during the 1960s were brought for violations of Fourteenth Amendment rights. *See generally* Louise Weinberg, *The Monroe Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 BYU L. REV. 737, 745-47. Section 1983 began to evolve from an effort to force states to enforce their own rights into an effort "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by

the Fourteenth Amendment might be denied by the state agencies." *Carter*, 409 U.S. at 428 – 429.

The statute gained popularity during the civil rights movement of the 1960s and 1970s after the *Monroe v. Pape* decision, which allowed § 1983 to remedy a constitutional injury inflicted by an officer. *See Weinberg* at 746. These cases again stressed constitutional due process and equal protection violations as guaranteed by the Fourteenth Amendment. *Id.* ("The decade immediately following *Monroe* was marked by increasing absorption of the Bill of Rights into the fourteenth amendment.").

2. Expansion to cover statutory rights

But the biggest step in the modern evolution of § 1983 came in 1980, when this Court first allowed it as a remedy for more than just civil rights or equal protection claims. *Maine v. Thiboutot*, 448 U.S. at 4. In *Thiboutot*, a father sued under § 1983 over the welfare benefits he was entitled to under the federal Social Security Act. The *Thiboutot* Court held that the plain meaning of § 1983's reference to rights under the Constitution "and laws" meant that violations of federal statutory laws, such as the federal Social Security Act, could be remedied through a § 1983 suit. Id. at 4-8.

The Court has clarified that under the *Thiboutot* standard, § 1983 suits were not available for all violations of federal law, but only for violations of *rights*. *See Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 19 (1981).

The Court has also specified that obligations created by federal laws under the spending power must be imposed on states unambiguously. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981). In *Pennhurst*, a patient

brought suit against a Pennsylvania hospital for providing a less than "minimally adequate habilitation," as required by the Developmentally Disabled Assistance and Bill of Rights Act. *Pennhurst*, 451 U.S. at 5-8. The question was whether Congress intended a "bill of rights" provision of the act to create enforceable rights and obligations through § 1983. The *Pennhurst* Court held that a statute must create enforceable rights before a court will imply a private cause of action; it must go beyond mere precatory language suggesting that Congress preferred that states provide certain types of treatment. *Id.*

"The crucial inquiry, however, is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Id.* at 25. The *Pennhurst* Court found that even though the Act listed a variety of conditions for the receipt of federal funds, the Act was voluntary like other federal-state grant programs, and the states were given the choice of complying with the conditions set forth in the Act or forgoing the benefits of federal funding. *Id.* In cases such as *Pennhurst* where the language of the Act was ambiguous, the Court found that Congress merely intended the legislation to serve as "a nudge in the preferred directions." *Pennhurst*, 451 U.S. at 19. "When Congress intended to impose conditions on the grant of federal funds…it proved capable of doing so in clear terms." *Id.* at 23. *See also Id.* at 17-18 ("In cases where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly.").

The *Pennhurst* Court found that Congress must express clearly its intent to impose conditions on the grant of federal

funds so that the states can knowingly decide whether or not to accept those funds before it will assume that a "right" has been created. *Id.* at 24. The Court found that the Act did not provide the express and clear language that illustrated a Congressional intent to impose mandatory conditions on the grant of federal funds.

3. *Differentiating systemwide obligations from individual rights*

In the decade after the *Pennhurst* decision, this Court on several occasions held that federal statutes can create private remedies if the obligations are unambiguous. But without language that specifically provides for a private remedy or that provides guidance to states in how to comply, the statute merely creates a generalized duty on the states to comply.

In *Suter v. Artist M.*, 503 U.S. 347 (1992), the question raised was whether Congress, in enacting the Adoption Assistance and Child Welfare Act ("Adoption Act"), unambiguously created a federally enforceable right to force states to make "reasonable efforts" to prevent children from being removed from their homes. The Supreme Court found that it did not because the language imposed "only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary." The Court also found that "Congress did not intend to create a private remedy for enforcement of the 'reasonable efforts' clause" because it did not create a federally enforceable right.

The *Suter* Court found that:

> The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

Suter, 503 U.S. at 356.

The Court distinguished those cases where the provisions of federal funding statutes were specific enough to imply a federally enforceable right. The Court found that in a case like *Wright v Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987), where federal housing legislation imposed a ceiling on the rates charged to low-income housing tenants and specifically defined in regulations how a reasonable rate for utilities in rent would be measured, the tenants had an enforceable right to sue. *Suter* at 357. Likewise, the Court found that in a case where the federal Medicaid legislation required the states to adopt reasonable rates for Medicaid facilities and then details the factors to be considered in determining the methods for calculating those rates, the obligation could be enforced by the Medicaid providers through a § 1983 suit. *Suter* at 359 (citing *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 519 (1990)).

In contrast, the statute in *Suter*, which required the State to make "reasonable efforts" to maintain an abused or neglected child in his home, or return the child to his home from foster care, did not provide statutory guidance as to how the "reasonable efforts" are to be measured. Id. at 360. "How the State was to comply with this directive, and with the other provisions of the Act, was, within broad limits, left up to the State." *Id.*

The *Suter* Court also found that while the statutory

provisions in the Adoption Act might not have provided a comprehensive enforcement mechanism so as to manifest Congress' intent to foreclose remedies under §1983 (which they did not reach due to their finding that the Adoption Act did not create a federally enforceable right), it showed that the absence of a remedy to individual plaintiffs under §1983 did not make the "reasonable efforts" clause moot since language of other sections of the Act showed that Congress knew how to impose precise requirements on the states when it intended to. *Suter* at 360-361.

The Court then summarized the standards for when a "right" is created, and distinguished such rights from more general "systemwide" performance policies, in *Blessing v. Freestone*, 520 U.S. 329 (1997). Examining a claim based on the denial of services under a child support services law, the *Blessing* Court provided a three-prong test for deciding whether enforceable rights are created. *Id.* at 340. First, Congress must have intended that the provision in question benefit the plaintiff. *Id.* at 341. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. *Id.* at 342. Third, the statute must unambiguously impose a binding obligation on the states. *Id.*

But just as importantly, the Court in *Blessing* made clear that many funding conditions imposed by Congress are meant to establish systemwide policies, not individual rights. Noting that plaintiffs must identify with particularity the rights they claimed, and that courts must examine these "manageable analytic bites," rather than the statute in general, the Court found that:

> The Court of Appeals did not engage in such a methodical inquiry. As best we can tell, the Court of

> Appeals seemed to think that respondents had a right to require the Director of Arizona's child support agency to bring the State's program into substantial compliance with Title IV-D. But the requirement that a State operate its child support program in "substantial compliance" with Title IV-D was not intended to benefit individual children and custodial parents, and therefore it does not constitute a federal right. Far from creating an *individual* entitlement to services, the standard is simply a yardstick for the Secretary to measure the *systemwide* performance of a State's Title IV-D program. Thus, the Secretary must look to the aggregate services provided by the State, not to whether the needs of any particular person have been satisfied. . . . In short, the substantial compliance standard is designed simply to trigger penalty provisions that increase the frequency of audits and reduce the State's AFDC grant by a maximum of five percent. As such, it does not give rise to individual rights.

Blessing at 343-4.

This distinction between individual rights and systemwide performance requirements is essential to understanding why FERPA and other information nondisclosure rules do not create individual rights that can be the impetus for § 1983 claims.

4. How FERPA fits within the § 1983 framework.

The provisions in FERPA are not specific enough to imply a federally enforceable right. At best, FERPA creates a "systemwide" right, which this Court has held is an insufficient basis for a §1983 claim.

FERPA is an information disclosure rule that specifies

how schools must handle student records if they wish to receive federal funds. It provides:

> No funds shall be made available under any applicable program to any educational agency or institution which has a *policy or practice* of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following [exceptions].

20 U.S.C. § 1232g(b)(1)(emphasis added).

Created pursuant to the spending power of Congress, FERPA merely demonstrates granted incentives by Congress to regulate the states' conduct. The specific language in FERPA gives the Secretary discretion to determine whether an educational institution has engaged in a "policy or practice" of disclosing personally identifiable information held in education records. The Act provides that the Secretary may withhold federal funding if the educational institution fails to satisfy the requirements of the Act.

Like the "reasonable efforts" language in *Suter*, the "policy or practice" language in FERPA does not provide enough guidance to create more than a generalized duty of compliance by the educational institutions. Furthermore, the language specifically provides the Secretary with discretion to determine when an educational institution has failed to comply with FERPA. When the Secretary finds noncompliance, the federal funding must be withheld.

FERPA clearly addresses a "systemwide" policy interest, rather than an individual right.

First, FERPA was not intended to protect against single isolated instances of disclosure. In the case before the court, the student argued that the individual release of his education records among Gonzaga University personnel and to the Office of the Superintendent of Public Instruction violated a right under FERPA. But FERPA does not prohibit individual disclosure of education records. Instead it creates a potential funding penalty for institutions that have a "policy or practice" of releasing records covered by the statute without consent. "[FERPA] addresses the conditions under which an institution becomes ineligible for funds. It does not prohibit a request for or release of student records." *Tombrello v. USX Corp.*, 763 F.Supp. at 545. Nor does it provide any individuals with a remedy to enforce the statute. The purpose behind FERPA was to provide students with access to their education records and to limit the transferability of their education records to third parties without their advance knowledge and consent. When the Secretary of Education determines that a university has engaged in a policy or practice of non-compliance, the only recourse is the discretion of the Secretary of Education to determine what educational institutions have not complied and then to withhold funds. From the language of FERPA alone, educational institutions may not engage in a policy or practice of education record disclosure in order to obtain federal funding, but FERPA does not specifically regulate single isolated instances of disclosure. Thus, FERPA was not intended to create individual rights, but to encourage a systemwide policy of nondisclosure. Without an individual right, the test fails.

Second, unlike some other federal funding statutes Congress created, FERPA's provisions are too vague and amorphous to enforce. In *Wright*, the statute specifically defined how a "reasonable amount of utilities" would be

determined. In *Wilder*, the statute also defined the computable and measurable rates that states were required to reimburse to Medicaid providers. FERPA's provisions are more like the statutes in *Suter* and *Blessing*, which refer to a particular plan that states were to adopt. In *Suter*, the statute required the participating states to make "reasonable efforts" to avoid removing children from their homes and to return children to their homes, *Suter*, 503 U.S. at 351, but gave discretion to the states on how to carry out those efforts. *See Id.* In *Blessing*, the statute required the participating states to certify that they were operating in "substantial compliance" with the Act. The Court found in *Blessing* that the "substantial compliance" language didn't create individual entitlement to the services outlined in the Act, but rather provided a "yardstick for the Secretary to measure the systemwide performance." *Blessing*, 520 U.S. at 343. Likewise, FERPA speaks in terms of a "policy or practice" of nondisclosure, but leaves the discretion to the educational institutions to carry out the "policy or practice." Nothing in the regulations define what a policy or practice would entail.

Finally, since FERPA does not unambiguously prohibit the release of an individual's education records, but merely prohibits a "policy or practice" of disclosure and then provides little guidance to the states as to what that "policy or practice" might entail, it fails the last prong of the *Blessing* test that requires an unambiguous binding obligation on the states.

Even presuming, for the sake of argument, that what the student alleges is true and Gonzaga University did release the personally identifiable information in the student's education records to the student's detriment, this action only constitutes one individual instance of disclosure and does not indicate a

"policy or practice" of disclosure, as FERPA's provisions unambiguously require. Thus, it fails the final requirement that the statute unambiguously imposes a binding obligation on the states because the entitlement the student raises in his claim is not the same requirement imposed on the educational institutions. The language of the statute unambiguously states that the educational institutions are prohibited from adopting a "policy or practice" of disclosure, rather than an individual release of records.

As in *Blessing*, FERPA was not intended to ensure that "the needs of any particular person have been satisfied," but merely required participating schools to have a systemwide plan in place. *Blessing*, 520 U.S. at 343.

B. This case provides the court with the opportunity to determine what level of privacy "interest" identified by Congress rises to the level of a justification for a 1983 civil rights claim.

While the line of cases above are useful in a determination of what statutory mandates create "rights," it is not at all clear that they are helpful in the specific area of privacy rights. In fact, privacy claims allowed under § 1983 have generally been based on *constitutional*, not statutory, rights, usually under the Fourth Amendment. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (discussion of immunity for officers in entry into home; Fourth Amendment violation case under § 1983); *Valdez v. McPheters*, 172 F.3d 1220 (10th Cir. 1999) (expectation of privacy in residence is protected under Fourth Amendment and thus remediable under § 1983); *Jackson v. Gates*, 975 F.2d 648 (9th Cir. 1992) *cert. denied,* 113 S.Ct.

2996 (1993) (forcing officer to undergo urinalysis test absent cause was violation of Fourth Amendment and remediable under § 1983).

The Court here has the opportunity to clearly establish what has been left unclear in the § 1983 privacy cases: what information is so "personal" that its disclosure invokes a privacy right violation sufficient for a § 1983 claim. Such a violation should only be found when the privacy invasion is so highly personal or intimate that it reaches the level of an infringement of constitutionally protected privacy rights, not simply when a Congressional funding requirement was not met by an official of the state or institution.

It is worth noting that Congress's power to create a privacy "right" under its spending power is still suspect. Conditional spending measures carry with them the penalty of revocation of funding for noncompliance; the power to create a "right" comes not from the Spending Clause of the Constitution, but from § 5 of the Fourteenth Amendment, which gives Congress the power to make laws to enforce the due process and equal protection provisions of § 1 of that amendment. In *Pennhurst*, the Court noted that it was unnecessary to address the question of whether a right is "appropriate" under Congress' Fourteenth Amendment powers only because the Court had found that there was no right created in the Developmentally Disabled Assistance and Bill of Rights Act. 451 U.S. at 16 (fn. 12). And as the *Pennhurst* Court noted, "Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." 451 U.S. at 16.

The privacy "rights" allegedly created by FERPA are not

justified by the Fourteenth Amendment. Outside of the sphere of Fourth Amendment privacy cases, the personal privacy issues that traditionally have warranted constitutional protection — usually related to marriage, procreation, contraception, and child rearing — concern protection against certain types of government intrusions into personal and private matters, but do not create a "general constitutional 'right of privacy.'" *Whalen v. Roe*, 429 U.S. 589, 608 (1977) (Justice Stewart's concurrence). Furthermore, privacy rights against government intrusion are distinct from the interests in non-disclosure promoted in cases like the present one. This distinction is magnified when there is a legitimate state interest in releasing some information that might be considered private, such as the campus crime information discussed *infra* at 26-27.

In addition, educational institutions have a legitimate interest in some disclosures of information, whether that means in informing the university community of crime and safety concerns, or in maintaining the integrity of its moral character certification processes, as in the present case. The purpose behind school certification of an applicant is that the school is in the best position to verify an applicant's moral conduct. A school must be permitted to deny an applicant's affidavit, which involves disclosing information about the student. Otherwise, the entire purpose of the school's certification processes is defeated. The certification process by the school would be pointless since all applications would be automatically granted regardless of a student's true character.

C. When Congress intends to create an enforceable privacy interest, it explicitly does so.

Congress has in the past successfully created privacy

statutes where it wanted to protect the unwarranted invasion of privacy of individuals. The Privacy Act was created in 1974 in order to regulate the collection, maintenance, use, and dissemination of personal information by federal government agencies. 5 U.S.C. § 552a(b) (2002). Congress provided that private entities, state and local government agencies, and individuals, unless sued in their official capacity as government officials, are not subject to the Act. However, it did create one exception. It made federal, state, and local governments liable under the Privacy Act for disclosure of an individual's Social Security number. *See* Privacy Act of 1974, PL 93-579, §7, 88 Stat 1896 (1974). In those instances, a person may file suit against a state or local agency for violation of privacy.

Similarly, the Drivers Privacy Protection Act was created in 1994 in order to restrict the release and use of certain personal information in state motor vehicle records.18 U.S.C. § 2721 (2002). It specifies exactly what criminal and civil penalties can be levied against officials who violate the act, 18 U.S.C. § 2724 (2002), as well giving individuals the right to sue for violations. Id.

Another example is the Fair Credit Reporting Act, which was created in 1970 to "insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. §1681 (2002). The Act provides the circumstances in which information may be disclosed by reporting agencies. Violations of the provisions of the FRCA will result in fines under Title 18, imprisonment for not more than 2 years, or both. 18 U.S.C. §1681r (2002).

In each of these privacy statutes, Congress granted power to individuals to sue state and local agencies that have

violated the provisions in the statute. It also required state agencies to comply with the provisions. In some statutes, Congress provides intricately detailed civil remedies for failure to comply with the statute's provisions, such as it did in the Privacy Act. *See* 5 U.S.C. §552a(g)(1) (2002). For example, under the Privacy Act, refusal or failure to comply with the provisions gives power to the individual to bring a civil action against the agency, and even statutorily provides jurisdiction of the civil suits to the district courts of the United States, as well as judicial guidance for judgments. 5 U.S.C. §552a(g). In other statutes, Congress merely provides that violations will result in fines or imprisonment, or both. *See* 18 U.S.C. § 2724. *See also* 18 U.S.C. § 1681r.

Congress is capable of writing provisions in statutes to provide individuals the power to enforce a particular statute against an agency for invasions of privacy. Had Congress intended FERPA to similarly provide individuals with a enforceable right to sue for noncompliance, it would have directly provided so in the statute.

II. Allowing § 1983 claims under a federal statute like FERPA will undermine state action to protect citizens' interests and lead to greater government secrecy by undermining state open records laws.

A. Allowing remedies beyond government revocation of funds will have sweeping consequences.

Educational institutions voluntarily elect to accept funding and thus submit to the requirements of FERPA. Congress did not force schools to comply with FERPA, but rather provided an incentive — federal funding — to comply. The plain

language of the statute, as well as the regulations, support this interpretation. *See* 20 U.S.C. §1232g(b)(1). *See also, e.g.,* 34 C.F.R. § 99.67 ("If, after an investigation under § 99.66, the Secretary finds that an educational agency or institution *has complied voluntarily* with the Act or this part, the Secretary provides the complainant and the agency or institution written notice of the decision and the basis for the decision.") (emphasis added).

Allowing § 1983 suits to enforce FERPA encourages administrative agencies and courts to create additional remedies other than the one Congress provided — revocation of funds for noncompliance. The Sixth Circuit is currently considering just such a case, where a federal District Court allowed the U.S. Department of Education, invoking FERPA, to obtain an injunction forbidding a state university from releasing campus court records involving criminal behavior by students. *U.S. v. Miami University*, No. 00-3518 (6th Cir. filed April 27, 2000). In effect, this gave the federal government injunctive power, similar to a 1983 case, in order to directly subvert a state open records law requirement. *U.S. v. Miami University*, 91 F.Supp.2d 1132 (2000).

In July 1997, the Ohio Supreme Court ruled that student disciplinary records relating to criminal behavior[3] maintained by a public college were not "education records" under FERPA, and therefore were subject to the Ohio state open records law. *See State ex rel. The Miami Student v. Miami University*, 79 Ohio St.3d 168, 680 N.E.2d 956 (1997). When a subsequent request was made to the universities to release the campus crime records, the Department of Education

[3]This did not pertain to academic misconduct, such as cheating or plagiarism or other non-criminal offenses.

intervened and sought an injunction, a power it had never before exercised in a FERPA case,[4] to prevent the schools from releasing the information. *See Miami University*, 91 F.Supp. 2d 1132, 1136. The federal district court disregarded the state supreme court's decision on the open records question and prohibited the disclosures under FERPA. *Id.*

But as discussed *supra* at 15, FERPA does not prohibit the disclosure of records. FERPA should not be viewed as a weapon used by the federal government to eviscerate state public records laws.

B. Making public policy decisions by balancing privacy and access interests has traditionally been and is appropriately left to state legislatures.

Every year, states modify their access laws in an effort to fine-tune the balance between the competing interests of public access to information and the interest in personal privacy when individuals are identified in records. The balancing is by no means perfect, and the balance that reconciles those competing interests is often elusive. Yet legislatures will react to problems that arise, often enacting

[4]The regulations regarding FERPA limit the Secretary to the following remedies, when determined that a school has failed to comply:

1) Withhold further payments under any applicable program;

2) Issue a complaint to compel compliance through a cease-and-desist order; or

3) Terminate eligibility to receive funding under any applicable program.

34 C.F.R. § 99.67

openness reforms when confronted with corruption that flourished in secrecy, and enacting secrecy measures when individuals feel that purely personal information about them is being disclosed to others. Openness advocates are kept busy fighting for the public's right to know how its government operates and what information it has gathered to guide its decisions.

Although this method of legislating does not lead to a perfect balance, it is far more appropriate in a democratic system than a scheme where state actors refuse to release information out of fear of civil rights litigation because of the sweeping nature of a conditional spending provision. Allowing § 1983 claims for perceived violations of statutes like FERPA, whose provisions are unclear to begin with,[5] as well as all future regulations enacted by Congress that address privacy interests but create no private cause of action, will have staggering implications. States will have no choice but to completely bar access to entire categories of information once Congress acts in a particular area, for fear of massive civil rights liability for alleged violations. The debates over balancing the public interests in disclosure of information

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[5]See, for example, the discussion of *amici* The Reporters Committee for Freedom of the Press and The Student Press Law Center, in the other FERPA case heard by this Court this term, *Owasso Indep. School District v. Falvo*, 534 U.S. ___ (2002), *reversing* 233 F.3d 1203 (10th Cir. 2001), pointing out to the court that the requirements of FERPA have been significantly misinterpreted by various states, school districts and universities, to the detriment of the public. Brief *Amicus Curiae* of The Reporters Committee for Freedom of the Press and The Student Press Law Center at 19-28, *Owasso Indep. School District v. Falvo*, 534 U.S. ___ (2002), *reversing* 233 F.3d 1203 (10th Cir. 2001).

with the private interest in secrecy of personal information will simply end under the shadow of a disclosure "death penalty" in the name of civil rights.

This balancing between access and privacy interests is appropriately left to the state legislatures. Allowing § 1983 claims not only negates the role of those legislatures, it also ignores the balancing of interests already performed by Congress in enacting federal laws. There are a multitude of laws enacted by Congress to govern the dissemination policy of government records. Congress balanced these interests in the manner it felt was most appropriate. Allowing § 1983 suits to be brought on these statutes disrupts the tenuous balance struck by Congress between access and privacy.

These laws are information dissemination laws, not civil rights laws, and should not be made such through a misapplication of § 1983.

C. Eliminating this balancing of interests would have a drastic effect on public access to campus crime information.

The harms discussed generally above are real and would have an immediate effect. Specifically, allowing this claim would negate attempts to satisfy the public interest in receiving information on campus crime.

In the year 2000, there were 395 murders, 3,982 forcible sex offenses, 12,894 robberies, 18,761 aggravated assaults, 68,486 burglaries, and 2,008 instances of arson, among other serious crimes reported on college and university campuses across the United States, according to the U.S. Dept. of Education. *See* OFFICE OF POSTSECONDARY EDUCATION,

DEP'T OF EDUCATION, *Campus Crime Statistics Online*, http://www.ed.gov/offices/OPE/PPI/security.html (last seen on February 6, 2002). Nearly 80 percent of campus crime is student-on-student crimes, and 95 percent of all campus crimes are drug or alcohol related. *See* Student Right-To-Know and Campus Security Act, PL 101-542, §202(2), 104 Stat 2381 (1990).

During an academic year, nearly one out of every 36 college women will be a victim of an attempted or completed rape. *See* BONNIE S. FISHER, et al., U.S. DEP'T OF JUSTICE, *The Sexual Victimization of College Women* (2000). In an average five-year college career, the totals of victimized women reach nearly 20 to 25 percent of college women. Id. The perpetrators are most likely classmates. Id. About 36 percent of the completed rapes and 44 percent of the attempted rapes were committed by other students. Id. Most of these rapes are never reported to the authorities. Id.

Crimes on campuses is a grave problem. The education system cannot run smoothly with constant threats to the safety and welfare of the students. The Ohio Supreme Court in the *State ex rel. Miami Student v. Miami University* case, *supra* at 22, acknowledged the increase of campus crime and stressed that access to campus crime information helps students and parents make intelligent decisions concerning which university to attend. 680 N.E. 2d 956 (Ohio 1997).

However, the fear of FERPA claims has encouraged colleges and universities to withhold campus crime information from the public, even when that information would have been public if it had been gathered by local police departments and even in some cases where it is otherwise mandated to be public information by either state or federal law. *See* TOM DICKSON, *Buckley Amendment, Censorship Still Problems for College Newspapers*, COLLEGE MEDIA REVIEW, 8-13 (1997). *See also* U.S. DEP'T OF EDUCATION, "Dear Colleague" Letter Gen-96-11.

Allowing § 1983 suits to enforce federal privacy interests will have a chilling effect on the willingness of government agencies to release public information for fear of civil rights litigation. Subjecting educational institutions to § 1983 actions by students to enforce FERPA rights would only make them more reluctant to disclose campus crime information than they already are, which would only further deny students and their parents the opportunity to make informed decisions about which campuses are safe and how to avoid criminal victimization on and around their campuses. In a study conducted last year, more than half of 3500 students who were surveyed said that they were more likely to report crimes if the crime reports were accessible to the public. *See* S.M. JANOSIK & D.D. GEHRING, *The Impact of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act on Student Behavior*, 4 (2001).

Ohio's highest court recognized the potential harms on university students, prospective students, and their parents when the public is kept in the dark about criminal incidents on campus:

> Unfortunately at present, crimes and other student misconduct are escalating at campuses across the nation. For potential students, and their parents, it is imperative that they are made aware of all campus crime statistics and other types of student misconduct in order to make an intelligent decision of which university to attend. Likewise, for students already enrolled in a university, their safety is of utmost importance. Without full public access to disciplinary

proceeding records, that safety may be compromised.

State ex rel. The Miami Student v. Miami University, 79 Ohio St. 3d at 172.

General statistics do not give students and their parents enough details to make an informed decision on what school to attend or, if already enrolled, what areas of campus to avoid. Most students get their campus crime information through news reports. In a survey taken among college students, about 60 percent of more than 3500 students surveyed said they read reports, newsletters, and flyers compiled at their institutions related to crime and safety, mostly through the student newspaper. *See* JANOSIK at 4, 18. These students were most likely to be women than men, and some of them had already been victims of campus crime. *See Id.* Many of them also added that they would be willing to change their behavior in how they protected themselves from harm and how they moved around on campus after what they had read about crimes and safety on campus. *Id.*

Congress itself realized the importance of releasing campus crime information. In 1998, it amended FERPA and allowed for disclosures of campus crime information. *See* 20 U.S.C. §1232g(b)(6)(B). But if § 1983 claims are permitted as a means of enforcing federal statutes like FERPA, states will almost certainly have no choice but to completely bar access to entire categories of information once Congress acts in a particular area for fear of massive civil rights litigation liability.

Permitting these types of claims will allow federal courts, as the court did in *U.S. v. Miami University*, to continue to ignore the balance the state legislatures have created in weighing the public's interest in information against individ-

ual privacy interests. The courts should not ignore the government's interest in strong open government laws. Permitting courts to create these remedies when Congress did not unambiguously through FERPA risks the elimination of a valuable oversight of government by its citizens, making it harder for the public to keep those institutions accountable for their actions.

CONCLUSION

Amici respectfully urge that this court overturn the Washington Supreme Courts' determination that a § 1983 remedy is proper under FERPA. Recognizing such a broad privacy right springing from a statute meant only to create a systemwide program will have damaging consequences for the public's ability to hold its public institutions accountable.

Respectfully submitted,

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No. 01-679

FEB 25 2002

In the

Supreme Court of the United States

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
Petitioners,

v.

JOHN DOE,
Respondent.

On Writ of Certiorari
To the Supreme Court of the State of Washington

BRIEF OF THE STATES OF ILLINOIS, ALABAMA, DELAWARE, FLORIDA, HAWAII, MARYLAND, MISSISSIPPI, NEBRASKA, NEVADA, NEW JERSEY, OHIO, OREGON, UTAH, WASHINGTON, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether an individual may maintain an action for damages under 42 U.S.C. §1983 to enforce provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. §1232g, a Spending Clause statute that prohibits recipients of federal funds from having a policy or practice of releasing educational records to unauthorized persons.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Statutes That Create Conditional Funding Programs Are Not "Laws" Within The Meaning Of 42 U.S.C. §1983 3

A. The 43rd Congress Used "Laws" In 42 U.S.C. §1983 In Its "Generic Sense," To Mean Legally Binding Precepts Issued By A Sovereign 4

B. Spending Clause Statutes Merely Set Forth Contractual Terms That Prospective Funding Recipients Are Free To Accept Or Reject And Therefore Are Not "Laws" That Have Legally Binding Force 7

C. The 43rd Congress Would Not Have Intended The "Tort Liability Created By §1983" To Be Used To Remedy Contractual Breaches Occasioned By States' Failure To Comply With Federal Funding Conditions 12

II. 42 U.S.C. §1983 Should Not Be Available To Enforce Conditional Funding Statutes That Do Not Give Rise To Private Causes Of Action And Instead Create Administrative Enforcement Mechanisms 16

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES:

Abeles v. Cochran, 22 Kan. 405 (1879) 14

Alexander v. Sandoval, 532 U.S. 275 (2001). 5, 18, 20

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 22

Blessing v. Freestone, 520 U.S. 329 (1997) 3, 13, 14, 16-18

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City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 5, 12-13

City of Providence v. Miller, 11 R.I. 272 (1876) .. 14

College Sav. Bank v. Florida Prepaid Postsec. Educ. Expense Bd., 527 U.S. 666 (1999) 15

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 5

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Fay v. South Colonie Cent. Sch. Dist., 802 F.2d 21 (2d Cir. 1986) 19

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Grove City College v. Bell, 465 U.S. 555 (1984) ... 8

Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) 21

Gundlach v. Reinstein, 924 F. Supp. 684 (E.D. Pa. 1996), *aff'd*, 114 F.3d 1172 (3d Cir. 1997) .. 21

Hodgson v. Dexter, 5 U.S. (1 Cranch) 345 (1803) . 14

Jackson Transit Auth. v. Local Div. 1285, Amalg. Transit Union, 457 U.S. 15 (1982) 3

Karahalios v. National Fed'n of Fed. Employees, Local 1263, 489 U.S. 527 (1989) 20

Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256 (1985) 10

Livadas v. Bradshaw, 512 U.S. 107 (1994) 6

Maine v. Thiboutot, 448 U.S. 1 (1980) 3-6, 13

Massachusetts v. Mellon, 262 U.S. 447 (1923) 8

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 6-7

McCurdy v. Rogers, 21 Wis. 197 (1866) 14

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Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299 (1986) 13

Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) 5

Morales v. Trans World Air, 504 U.S. 374 (1992) . 7

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Ogden v. Raymond, 22 Conn. 379 (1853) 14

Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947) 8, 9

Olsson v. Indiana Univ. Bd. of Trustees, 571 N.E.2d 585 (Ind. Ct. App. 1991) 19

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 8, 12, 15, 21

Samuels v. District of Columbia, 770 F.2d 184 (D.C. Cir. 1985) 17

Simonds v. Heard, 40 Mass. (23 Pick.) 120 (1839). .14

Smith v. Robinson, 468 U.S. 992 (1984) 17

South Camden Citizens in Action v. New Jersey Dep't of Env. Prot., 274 F.3d 771 (3rd Cir. 2001) .21

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Suter v. Artist M., 503 U.S. 347 (1992) 8, 21

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Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) 17

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United States v. Marion County Sch. Dist., 625 F.2d 607 (5th Cir. 1980) 10, 15

United States v. Miami Univ., 91 F. Supp. 2d 1132 (S.D. Ohio 2000) 4, 18

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United States v. Tingey, 30 U.S. (5 Peters) 115 (1831) 15

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Westside Mothers v. Haveman, 133 F. Supp. 2d 549 (E.D. Mich. 2001) 9

West Virginia ex rel. Garden State Newspapers, Inc. v. Hoke, 205 W. Va. 611 (1999) 19

Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990). 3

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) 5, 13, 22

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CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const. art. I, §8, cl. 1 1

U.S. Const. art. VI, cl. 2 ..... 6, 9

U.S. Const. art. IV, §3, cl. 2 12

17 Stat. 13 4

20 U.S.C. §1232g(f) 18

20 U.S.C. §1232g(g) 18

42 U.S.C. §1983 ..... *passim*

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INTEREST OF THE AMICI CURIAE

This case addresses the extent to which 42 U.S.C. §1983 may be used to vindicate rights allegedly secured under conditional funding statutes enacted pursuant to Congress's spending power, and in particular whether §1983 may be used to vindicate rights allegedly created by FERPA. The States have a strong interest in the resolution of both the general and particular issues. States, state agencies, and state officials participate in hundreds of cooperative state-federal programs developed by Congress under its Spending Clause power. In addition, States are bound to observe FERPA's requirements to the extent they receive federal funding in connection with their operation of public universities and other schools.

SUMMARY OF ARGUMENT

1. The question in this case is whether FERPA may be enforced through 42 U.S.C. §1983, which provides a cause of action against anyone who, acting under color of state law, causes deprivations of "rights . . . secured by the Constitution and laws." The answer is no. Conditional funding statutes like FERPA do not "secure" rights and are not "laws" within the meaning of §1983. Instead, statutes enacted pursuant to the Spending Clause (U.S. Const. art. I, §8, cl. 1) merely set forth conditions that prospective recipients must abide by if they choose to accept federal funds. If funds are accepted, the attached conditions become legally binding as a matter of basic contract law. But it is the resulting contract between the government and the funds recipient, not the statute describing the conditions attached to funds, that creates and secures rights for third-party beneficiaries. Because contracts

of this sort are not "laws" within the meaning of §1983, they cannot be enforced through that provision.

2. Even if conditional funding statutes are "laws" within the meaning of §1983, actions under that provision should not be available to enforce those funding statutes, including FERPA, that create administrative enforcement mechanisms but do not create private rights of action. With respect to statutes of this sort, Congress obviously believes that the administrative mechanism is a sufficient vehicle for policing compliance with funding conditions on the part of *private* recipients. There is no reason to suspect that Congress has the precise opposite belief with respect to *public* fund recipients, and therefore intends to subject those recipients to enforcement actions brought under §1983. Instead, the presumption should be that Congress intends to treat private and public fund recipients equally. Conditional funding statutes like FERPA are, after all, contractual in nature, and they create the same contract between the federal government and every entity that accepts federal funds, whether public or private.

Accordingly, unless Congress *expressly* authorizes §1983 actions against public fund recipients to enforce conditional funding statutes, the Court should presume that Congress intends for administrative mechanisms to be sufficient and exclusive enforcement vehicles, just as they are with respect to private fund recipients. And because FERPA contains no express language authorizing §1983 enforcement actions, the Court should conclude that such actions cannot go forward.

ARGUMENT

I. Statutes That Create Conditional Funding Programs Are Not "Laws" Within The Meaning Of 42 U.S.C. §1983.

In *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), this Court held that the phrase "and laws" as used in 42 U.S.C. §1983 "means what it says," so that §1983 "broadly encompasses violations of federal statutory . . . law." Since *Thiboutot*, this Court has proceeded on the view that conditional funding statutes enacted pursuant to Congress's spending power may secure rights enforceable under §1983. *See, e.g., Blessing v. Freestone*, 520 U.S. 329, 340-48 (1997); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 501 (1990); *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 419 (1987); *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 29 n.12 (1982). This view bears reexamination.

Although *Thiboutot*'s main point—that "and laws" embraces statutory as well as constitutional rights—may be sound, it does not follow that all congressional enactments are "laws" in the sense contemplated by §1983. To the Reconstruction-era Congress, "laws" meant the general run of statutes that compel or forbid conduct, regulate relationships, and otherwise create rights and duties. Conditional funding statutes enacted pursuant to the Spending Clause do none of these things. Unlike most federal enactments, conditional funding statutes have no obligatory force; they only set forth conditions that become obligatory as a matter of contract law once a prospective recipient accepts federal funds. Consequently, conditional

funding statutes like FERPA are not "laws" that "secure rights" within the meaning of 42 U.S.C. §1983.[1] Because *Thiboutot* and its progeny have not accounted for the unique nature of conditional funding statutes, the Court should consider the matter anew and hold that such statutes may not be enforced in actions brought under §1983.

A. The 43rd Congress Used "Laws" In 42 U.S.C. §1983 In Its "Generic Sense," To Mean Legally Binding Precepts Issued By A Sovereign.

Section 1 of the Civil Rights Act of 1871 imposed liability on anyone who deprived a person of rights "secured by the Constitution of the United States." 17 Stat. 13. In 1874, the 43rd Congress amended the statute, which was later codified at 42 U.S.C. §1983, to protect rights secured by "the Constitution *and laws*." In *Thiboutot* the Court construed this amendment broadly to embrace all federal statutes. 448 U.S. at 4. But even if a broad construction of the amendment is warranted, the 43rd Congress did not intend to expand §1983's coverage to include rights secured through Spending Clause legislation.

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[1] It is beyond dispute that Congress enacted FERPA pursuant to its power to spend for the general welfare. *See United States v. Miami Univ.*, 91 F. Supp. 2d 1132 (S.D. Ohio 2000); *Gundlach v. Reinstein*, 924 F. Supp. 684, 690 (E.D. Pa. 1996), *aff'd*, 114 F.3d 1172 (3d Cir. 1997); *see also* Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 Am. U. L. Rev. 1, 5 (2001).

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see also Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981). If the statute's text and structure are clear, then the interpretative task is at an end, *Alexander v. Sandoval*, 532 U.S. 275, 288 & n.7 (2001), but if the statute's language is ambiguous, then "we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent." *National Sea Clammers*, 453 U.S. at 13. When construing §1983 in particular, the Court presumes that the Reconstruction-era Congress was familiar with the common law, and therefore attempts to read the statute to comport with common law principles absent evidence that Congress intended to depart from them. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 67 (1989); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

The phrase "and laws" as used in 42 U.S.C. §1983 does not plainly include or exclude conditional funding legislation enacted pursuant to the Spending Clause. In addition, "not a single shred of evidence in the legislative history" explains why Congress added this phrase to the statute. *Thiboutot*, 448 U.S. at 14 (Powell, J., dissenting). Yet Congress obviously intended "and laws" to refer to *some* category of statutes; even the dissenting justices in *Thiboutot* agreed that the phrase encompassed the equal rights legislation contained in the Civil Rights Acts of 1866 and 1870. *Id.* at 19 n.6 (Powell, J., dissenting). Because §1983 contains no language modifying "and laws," the *Thiboutot* majority took the view that the

phrase warranted a broad construction, and thus concluded that all federal statutes, not just equal rights legislation, fall within its ambit. 448 U.S. at 4.

But if the *Thiboutot* Court was correct that "laws" was intended to have a broad meaning, then the 43rd Congress most likely used the term in its "generic sense, as meaning the rules of action or conduct duly prescribed by controlling authority, and having binding legal force; including . . . statutes." *United States Fid. & Guar. Co. v. Guenther*, 281 U.S. 34, 37 (1930). This "generic sense" of the term would have been commonly accepted in 1874. *See, e.g.*, Fortunatus Dwarris, *A General Treatise on Statutes* 38 (1871) (defining "statutes" as encompassing "those rules of conduct which are introduced by the lawmaking power in an express and positive form; which control the particular cases and circumstances to which they relate or describe"); 2 *Burrill's Law Dictionary* 132 (2d ed. 1867) (defining "law" as "a rule of civic conduct, prescribed by the supreme power in a state").

Applying this conception of "laws" to §1983 cannot be objectionable, because it comports with the *Thiboutot* Court's understanding that the term requires a broad reading. It encompasses, for example, the Civil Rights Acts of 1866 and 1870, as well as the National Labor Relations Act, *see Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994) (NLRA secures rights enforceable under 42 U.S.C. §1983); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 109 (1989) (same). Indeed, most statutes enacted by Congress prescribe rules of action or conduct and have binding legal force as the "supreme Law of the Land," U.S. Const. art. VI, cl. 2; *McCulloch v.*

Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819), and are therefore "laws" as the 43rd Congress would have understood that term.

There is no evidence to support the view, however, that the 43rd Congress intended "and laws" as used in §1983 to extend beyond the broad, generic sense described above. *See Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992) (Court assumes that "ordinary meaning of [statutory] language accurately expresses the legislative purpose" (internal quotations and citation omitted)). The question, then, is whether conditional funding programs enacted pursuant to the Spending Clause are "laws" within this generic sense. As the following section shows, the answer is no.

B. Spending Clause Statutes Merely Set Forth Contractual Terms That Prospective Funding Recipients Are Free To Accept Or Reject And Therefore Are Not "Laws" That Have Legally Binding Force.

Conditional funding statutes enacted pursuant to the Spending Clause are not laws in the "generic sense" described above. Unlike most federal laws, conditional funding statutes do not prescribe rules of action or conduct and have no legal force. Instead, they merely spell out the conditions that prospective fund recipients must abide by *if* they agree to accept funds. Therefore, they are not "laws" which may be enforced through actions brought under 42 U.S.C. §1983.

As this Court has repeatedly explained, conditional funding programs enacted pursuant to the Spending Clause are contractual in nature: in return for federal funds, the recipient (whether a State or private entity) agrees to abide by conditions imposed by the federal government. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998); *Suter v. Artist M.*, 503 U.S. 347, 356 (1992); *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).[2] Prospective fund recipients may, if they so choose, decline federal funds if the attached conditions are objectionable, *see, e.g., South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987); *Pennhurst*, 451 U.S. at 11; *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 143-44 (1947); *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923), and in such instances the conditions will not be enforced, *see New York v. United States*, 505 U.S. 144, 167-68 (1992); *Grove City College v. Bell*, 465 U.S. 555, 575 (1984). The acceptance of the funds is thus a voluntary choice, and the conditions accompanying the funds become obligatory only when that choice is made. *See Pennhurst*, 451 U.S. at 17 ("The legitimacy of Congress's power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"); *cf. United States Dep't of Trans. v. Paralyzed Veterans of America*, 477 U.S. 597, 605 (1986) (through section 504 of the Rehabilitation Act of

[2] The Comptroller General has long taken the view that "the acceptance of a grant of Federal funds which is not unconditional but is subject to conditions which must be met by the grantee creates a valid contract between the United States and the grantee." 50 Comp. Gen. 470 (1970).

1973, Congress "enters into an arrangement in the nature of a contract with the recipient of the funds; the recipient's acceptance of the funds triggers coverage under the [Rehabilitation Act]").

Given the contractual nature of conditional funding programs, it is plain enough that legislation creating such programs cannot be equated with "law" in its "generic sense, as meaning the rules of action or conduct duly prescribed by controlling authority, and having binding legal force." *Guenther*, 281 U.S. at 37. Although conditional funding statutes are "laws" in the sense of being congressional enactments, they do not secure rights or impose duties and may be ignored or rejected without sanction. Thus, if Congress seeks to advance a federal policy through a conditional funding program enacted pursuant to its spending power, States or private parties can effectively thwart that policy by declining to participate in the program. *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. at 143-44, is an illustration; there Oklahoma thwarted federal policy by adopting the "simple expedient" of refusing to comply with the Hatch Act. This is a far cry from the typical federal statute, which, so long as it respects constitutional limits, must be obeyed as the "supreme Law of the Land," U.S. Const. art. VI, cl. 2. *See Westside Mothers v. Haveman*, 133 F. Supp. 2d 549, 561-62 (E.D. Mich. 2001) (Spending Clause legislation does not fall within the Supremacy Clause); *United States v. Morgan*, 230 F.3d 1067, 1073 (8th Cir. 2000) (Bye, J., concurring) ("Congress may indirectly regulate state conduct by attaching 'strings' to grants of money given to state and local governments, but those strings aren't *laws*." (emphasis in original) (citation omitted)), *cert. denied*, 122 S. Ct.

62 (2001).[3] In short, a statute that has no obligatory force can hardly be deemed a "law" in the sense contemplated by the 43rd Congress.

To be sure, conditions attached to federal funds are legally enforceable once a State or other entity accepts those funds. But the obligation arises as a matter of contract law, not as a matter of legislative decree. *See United States v. Marion County Sch. Dist.*, 625 F.2d 607, 609-11 (5th Cir. 1980) (United States may bring contract action to compel fund recipients to comply with federal funding conditions). As one commentator has explained: "What makes [federal funding] conditions obligatory is [their] essence as contract, wholly apart from the circumstance that they happen to be spelled out in a statute or an agency rule. Although articulated in a statute or rule, they have no force as 'law'; their force is only contractual." David E. Engdahl, *The Spending Power*, 44 Duke L. J. 1, 71 (1994).

The same reasoning applies to third-party rights "secured" under conditional funding programs. Rights

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[3] Outside the §1983 context, this Court has held that, once a recipient has accepted federal funds, the conditions attached to those funds trump contrary state laws by virtue of the Supremacy Clause. *See, e.g., Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 258 (1985); *Townsend v. Swank*, 404 U.S. 282, 285 (1971). These decisions do not, however, account for the contractual nature of Spending Clause programs, a point Chief Justice Burger observed in *Townsend*: "Congress has used the 'power of the purse' to force the States to adhere to its wishes to a certain extent; but adherence to the provisions of Title IV [of the Social Security Act] is no way mandatory upon the States under the Supremacy Clause." 404 U.S. at 292 (Burger, C.J., concurring).

of this nature arise by virtue of the fund recipient's contractual agreement to accept the conditions attached to the funds, not by virtue of any statutory enactment. Indeed, if prospective recipients decline funds offered under a federal spending program, then the rights contemplated by the statute creating the program do not come into existence. It follows that rights "secured" under conditional funding programs are secured by the common law of contract, not by any statutory law. And it has never been suggested that "and laws" as used in 42 U.S.C. §1983 should be construed to include the common law of contract.

The 43rd Congress would have understood that Spending Clause legislation derives its obligatory force from principles of contract law. In *McGee v. Mathis*, 71 U.S. (4 Wall.) 143 (1866), the Court discussed the legal obligations arising from an 1850 statute through which the United States granted lands to Arkansas on the condition that steps would be taken to cultivate them. The Court stated:

> It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constituted a contract. All the elements of a contract [are] met in the transaction, — competent parties, proper subject-matter, sufficient consideration, and consent of minds. This contract was binding upon the State, and could not be violated by its legislation without infringement of the [Contract Clause of the] Constitution.

71 U.S. (4 Wall.) at 155. Congress's power to dispose of lands derives not from the Spending Clause but from

the Property Clause, U.S. Const. art. IV, §3, cl. 2, but *Mathis* illustrates the general principle that legislative acts granting benefits to States with conditions attached are, once accepted, binding on the States as a matter of contract law. The 43rd Congress was presumably aware of this principle, and would have expected the "and laws" language contained in 42 U.S.C. §1983 to be construed with it in mind. *See United States v. Wells*, 519 U.S. 482, 495 (1997) ("we presume that Congress expects its statutes to be read in conformity with this Court's precedents"). Therefore, this Court should conclude that the 43rd Congress did not intend for conditional funding statutes enacted pursuant to the Spending Clause to be considered "laws" within the meaning of §1983.

C. The 43rd Congress Would Not Have Intended The "Tort Liability Created By §1983" To Be Used To Remedy Contractual Breaches Occasioned By States' Failure To Comply With Federal Funding Conditions.

Additional evidence that the 43rd Congress did not intend §1983 to be used as an enforcement vehicle for conditional spending programs may be gleaned from considering how far such a remedy would have departed from common law principles in 1874. If, as this Court has insisted, conditional funding programs are contractual in nature, *Pennhurst*, 451 U.S. at 17, it follows that violations of the conditions attached to federal funds are contractual breaches. Providing a remedy for such breaches through the "tort liability created by §1983," *Fact Concerts*, 453 U.S. at 258,

would have been a significant and surprising innovation in the late 19th century. Because there is no evidence that Congress intended this innovation, this Court should hold that §1983 cannot be used to enforce rights secured through conditional funding programs.

When a §1983 damages suit is brought to vindicate alleged rights under a conditional funding program, the plaintiff is typically not a party to the contract but instead is a third-party beneficiary. *See Blessing*, 520 U.S. at 349-50 (Scalia, J., concurring). In addition, the action is not directed against the State that entered into the contract—the State is not a "person" amenable to suit under 42 U.S.C. §1983, *Will*, 491 U.S. at 64—but instead is directed against a non-party to the contract (i.e., a public official in his individual capacity who acts as an agent of the State). *See Wright*, 479 U.S. at 423 ("*Maine v. Thiboutot* held that §1983 was available to enforce violations of federal statutes by agents of the State." (citation omitted)). Therefore, the typical §1983 action to enforce Spending Clause legislation may fairly be described as one non-party to a contract suing another non-party for a contractual breach under what is essentially a tort statute.[4]

It is highly unlikely that the 43rd Congress would have intended such an odd remedial scheme. As Justice Scalia pointed out in his concurring opinion in *Blessing*, the general rule in 1874 appears to have been

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[4] Section 1983 "creates a species of tort liability" and damages under the statute are "ordinarily determined according to principles derived from the common law of torts." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305-06 (1986) (internal quotations and citations omitted)).

that third-party beneficiaries were not permitted to sue on contracts. 520 U.S. at 349-50. Another general rule at that time was that agents were not liable for breaches of contracts they executed or performed on behalf of their principals. *See, e.g., Abeles v. Cochran*, 22 Kan. 405, 414 (1879) (Brewer, J.); *Ogden v. Raymond*, 22 Conn. 379, 384 (1853); *Simonds v. Heard*, 40 Mass. (23 Pick.) 120, 124 (1839); Joseph Story, *Commentaries on the Law of Agency* §261 (8th ed. 1874); 1 William W. Story, *A Treatise on the Law of Contracts* §247 (5th ed. 1874); William Paley, *A Treatise on the Law of Principal & Agent* 368 (4th ed. 1856).

This was especially true in the case of public officials. *See, e.g., Garland v. Davis*, 45 U.S. (4 How.) 131, 148 (1846) ("public agents are not usually liable on mere contracts or promises made in behalf of their principals"); *City of Providence v. Miller*, 11 R.I. 272, 277 (1876); *McCurdy v. Rogers*, 21 Wis. 197, 202-03 (1866). As Chief Justice Marshall explained in *Hodgson v. Dexter*, 5 U.S. (1 Cranch) 345, 363-64 (1803): "A contrary doctrine would be productive of the most injurious consequences to the public, as well as to individuals. The government is incapable of acting otherwise than by its agents, and no prudent man would consent to become a public agent, if he should be made personally responsible for contracts on the public account."

Had Congress intended to cast aside these settled and sensible rules in the case of contractual obligations arising out of Spending Clause programs, it would have done so in unmistakable terms, not by simply adding the phrase "and laws" to section 1 of the Civil

Rights Act of 1871. There is nothing to suggest, moreover, that the 43rd Congress saw a need to upset the prevailing common law rules. By 1874 it was established that the United States could sue to enforce its own contracts, *see United States v. Tingey*, 30 U.S. (5 Peters) 115, 128 (1831); *Dugan v. United States*, 16 U.S. (3 Wheat.) 172, 181 (1818); *Marion County Sch. Dist.*, 625 F.2d at 611, so it was not as if the States were (or are today) free to disregard their obligations under conditional funding programs. *Cf. Pennhurst*, 451 U.S. at 28 ("In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.").[5] Therefore, one cannot conclude that Congress meant "and laws" as used in 42 U.S.C. §1983 to create a supplemental remedy for third-party beneficiaries against agents of the States without ignoring the legal landscape as it existed in 1874.

In sum, the available evidence points to the conclusion that Congress did not intend for "and laws" as used in §1983 to include Spending Clause statutes. Therefore, because FERPA is undoubtedly a Spending Clause statute, this Court should hold that the plaintiff was not entitled to maintain a §1983 action against Gonzaga University to enforce FERPA, and should reverse the Supreme Court of Washington's judgment to the contrary.

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[5] Contract actions by the United States against individual States raise no difficulties under the Eleventh Amendment. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681 (1999).

II. 42 U.S.C. §1983 Should Not Be Available To Enforce Conditional Funding Statutes That Do Not Give Rise To Private Causes Of Action And Instead Create Administrative Enforcement Mechanisms.

Even if conditional funding statutes are construed as "laws" that "secure rights" within the meaning of 42 U.S.C. §1983, remedies under that provision should nonetheless be foreclosed where, as with FERPA, the funding statute in question does not give rise to a private cause of action but instead creates an administrative process to enforce compliance. There is no basis for concluding that Congress believes, as a general matter, that administrative remedies are sufficient to ensure compliance with funding statutes by *private* fund recipients, but are inadequate with respect to *public* fund recipients. Therefore, the presumption should be that, where a conditional funding statute creates an administrative enforcement mechanism but not a private right of action, §1983 actions may not be brought against public fund recipients absent a clear statement by Congress to the contrary. Such a presumption would respect congressional intent and would be consistent with the contractual nature of conditional funding programs.

1. Under the Court's current jurisprudence, the question whether §1983 is available to enforce statutes —conditional funding statutes or otherwise—turns first on whether the relevant provision of the statute creates an enforceable right. *Blessing*, 520 U.S. at 340-41. If the provision is found to create a right, then a rebuttable presumption arises that the right is enforceable through §1983. *Id.* at 341. The

presumption may be rebutted upon a showing that Congress "specifically foreclosed a remedy under §1983," either expressly or by "creating a comprehensive enforcement scheme that is incompatible with individual enforcement under §1983." *Id.* (internal quotations and citations omitted). The State has the burden of making the "difficult showing" that an enforcement scheme in a funding statute forecloses a §1983 remedy. *Blessing*, 520 U.S. at 346; *see also Wright*, 479 U.S. at 423-24 ("'We do not lightly conclude that Congress intended to preclude reliance on §1983 as a remedy' for the deprivation of a federally secured right." (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)).

The rule that a §1983 remedy is presumptively available whenever a statute is found to create rights stems from the canon that implied repeals of statutes are disfavored. *See Victorian v. Miller*, 813 F.2d 718, 721 (5th Cir. 1987); *Samuels v. District of Columbia*, 770 F.2d 184, 194 n.7 (D.C. Cir. 1985); Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. Chi. L. Rev. 394, 419-25 (1982); *see generally Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189-90 (1978) (explaining canon). That is, given that Congress has expressly provided a cause of action whenever a state actor deprives a person of rights secured by federal laws, 42 U.S.C. §1983, the courts are reluctant to foreclose that cause of action in the absence of clear evidence that Congress so intended. As a result, the courts presume the availability of a §1983 remedy, and place the burden on the States to produce evidence that Congress intended to foreclose that avenue of relief.

2. Although the presumption favoring §1983 remedies may be justified in most instances where a statute creates enforceable rights, it should not be indulged with respect to those conditional funding statutes, like FERPA, which do not give rise to private causes of action and instead create an administrative enforcement scheme. The question whether a statutory right should be enforceable through a §1983 action (or any other remedy) is at bottom a question of congressional intent. *See Sandoval*, 532 U.S. at 286; *Blessing*, 520 U.S. at 341. As the example of FERPA shows, a faithful inquiry into congressional intent will rarely reveal any reason to believe that Congress intended to subject public recipients, and only public recipients, to private suit to enforce funding conditions.

In FERPA, Congress expressed only one specific remedial intention: the creation of an administrative enforcement scheme applicable to all recipients of funds. In 20 U.S.C. §1232g(f), Congress generally authorized the Secretary of Education to "deal with violations of this section." And Congress more specifically required the Secretary to "establish or designate an office and review board" for investigating and adjudicating violations of FERPA, and permitted parents and eligible students to file written complaints with that board. 20 U.S.C. §1232g(g).[6] We also know,

[6] For an explanation of this administrative enforcement scheme, see Daggett & Huefner, *supra* n.1, at 11. In addition to the administrative scheme, at least one court has held that the federal government may sue fund recipients to enforce compliance with FERPA. *See Miami Univ.*, 91 F. Supp. 2d at 1140. There is no question, then, that remedies exist to ensure that fund recipients honor FERPA's commitment to educational privacy.

based on Congress's silence and other indicia of legislative intent, that Congress did not intend to create a separate private right of action directly under FERPA itself.[7]

Nothing in FERPA's language or legislative history even hints that Congress believed the administrative scheme was insufficient as to public entities, or that public recipients of funds needed to be treated differently from private recipients. And as a matter of public policy, it is difficult to understand why Congress would have wanted an individual allegedly harmed by a university's policy or practice with respect to the release of private information to be able to sue Pennsylvania State University (for example), but not the University of Pennsylvania.

This evidence of congressional intent—which strongly suggests that Congress did not intend to permit private §1983 actions—far outweighs the canon against implied repeals, which, like all canons of statutory construction, can be "overcome" by "other circumstances evidencing congressional intent." *Chickasaw Nation v. United States*, 122 S. Ct. 528, 535 (2001). Indeed, it is supported by another canon of

[7] The state and federal courts have uniformly held that FERPA does not create a private right of action. *See, e.g., Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 67 (1st Cir. 2002); *Tarka v. Franklin*, 891 F.2d 102, 104 (5th Cir. 1989); *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986); *Girardier v. Webster College*, 563 F.2d 1267, 1277 (8th Cir. 1977); *West Virginia ex rel. Garden State Newspapers, Inc. v. Hoke*, 205 W. Va. 611, 620 n.13, 520 S.E.2d 186, 195 n.13 (1999); *Olsson v. Indiana Univ. Bd. of Trustees*, 571 N.E.2d 585, 589 n.4 (Ind. Ct. App. 1991). The Supreme Court of Washington did not question this view in the proceedings below. *See* Pet. App. 19a.

statutory construction, the canon "that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies." *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 533 (1989); *see also Sandoval*, 532 U.S. at 290 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").

Justice Powell sounded a similar note when discussing the standards of liability under Title VI of the Civil Rights Act of 1964:

> [A] majority of the Court would hold that proof of discriminatory effect suffices to establish liability only when the suit is brought to enforce the regulations rather than the statute itself. And it would seem that the regulations may be enforced only in a suit pursuant to 42 U.S.C. §1983; anyone invoking the implied right of action under Title VI would be limited by the discriminatory-intent standard required to prove violations of Title VI. Thus, the apparent result is that a suit against *governmental* recipients of federal funds—who may be sued under §1983—will be governed by a different standard of liability than a suit against *private* recipients of federal funds. One would have difficulty explaining this result in terms of the legislative history of Title VI.

Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 608 n.1 (1983) (Powell, J., concurring).[8] Rather than allowing such anomalous results, this Court should conclude that §1983 actions are automatically foreclosed whenever the Court's implied right of action jurisprudence reveals that a conditional funding statute does not create a private cause of action and instead creates an administrative process to enforce compliance.

3. The contractual nature of conditional funding statutes provides still further support for this conclusion. "[W]e have required that if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *Dole*, 483 U.S. at 207 (quoting *Pennhurst*, 451 U.S. at 17). The "clear statement" requirement is thus a substantive limitation on Congress's use of the spending power: "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst*, 451 U.S. at 17; *see also Suter*, 503 U.S. at 356.

Moreover, the appropriate place for Congress to set forth conditions—especially conditions that implicate federalism concerns—is within the funding statute

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[8] Justice Powell's footnote anticipated this Court's decision in *Sandoval*. On the other hand, a powerful argument can be made that a §1983 suit cannot be brought to enforce the disparate-impact regulations issued under Title VI. *See South Camden Citizens in Action v. New Jersey Dep't of Env. Prot.*, 274 F.3d 771, 790 (3rd Cir. 2001) (§1983 suit may not be maintained to enforce disparate-impact regulations).

itself. *See Will*, 491 U.S. at 65 ("if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear *in the language of the statute*." (emphasis added) (internal quotations and citation omitted)). It cannot be said that §1983's language itself provides the requisite clear statement. Although §1983 expressly authorizes suits to enforce federally secured rights, the statute does not place prospective fund recipients on notice, through unambiguous terms, that it applies to any particular conditional funding statute. *Cf. Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-46 (1985) (discussing level of specificity needed to abrogate or extract waiver of States' Eleventh Amendment immunity).

Where Congress has not created a private cause of action to enforce a conditional funding statute, but has established an administrative remedial scheme, the logical inference to be drawn by parties to the agreement is that the methods for policing compliance with funding conditions will be limited to the administrative scheme. To return to a past example, one doubts that Pennsylvania State University accepted federal funds with the expectation that it, but not the University of Pennsylvania, would be subjected to private actions to enforce FERPA. A clear statement by Congress that the §1983 remedy applies would, of course, meet this concern. But absent such a statement, it belies reality to suggest that a public recipient of federal funds has agreed to private FERPA enforcement actions or had adequate notice that it might be subjected to such actions.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Washington should be reversed.

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February 2002

(7)

No. 01-679

Supreme Court, U.S.
FILED
FEB 25 2002
CLERK

In the Supreme Court of the United States

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
Petitioners,

v.

JOHN DOE,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF AMICI CURIAE AMERICAN ASSOCIATION OF COMMUNITY COLLEGES, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AMERICAN COUNCIL ON EDUCATION, ASSOCIATION OF AMERICAN UNIVERSITIES, ASSOCIATION OF JESUIT COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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38 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

STATEMENT OF INTEREST OF *AMICI*..... 1

SUMMARY OF ARGUMENT..... 4

I. FERPA'S ELABORATE REGULATORY SCHEME INCORPORATES DETAILED REQUIREMENTS AFFECTING VIRTUALLY ALL ASPECTS OF THE OPERATION OF EDUCATIONAL INSTITUTIONS AT EVERY LEVEL. 6

A. FERPA Reaches Every Level Of Education In The United States..... 7

B. The Statutory Definition Of "Education Record" Incorporates Virtually All Documents Containing Personally Identifiable Information..... 7

C. FERPA's Three Primary Conditions On Funding Involve It In All Aspects Of Educational Programs..... 9

1. Confidentiality..... 9

2. Parental Access..... 10

3. Challenge and Correction.... 11

D. An Unintended Consequence Of FERPA's Imposition of Conditions On Funding Has Been

To Involve Educational Institutions In Challenges By Interests Desiring to Obtain Access To Information In Education Records..... 12

E. The Rapid Evolution Of Information Processing Technology And The Relative Age Of FERPA Ensure A Constant Need For New Interpretation. 15

F. The Wording Chosen By Congress To Express The Conditions Which It Placed Upon The Receipt Of Federal Funding By Educational Institutions Takes Into Account The Often Ambiguous Nature Of Educational Records And Their Use In Schools And Colleges. 16

II. THE ANALYSIS ADOPTED BY THE WASHINGTON SUPREME COURT RISKS EXTENDING § 1983 JURISDICTION TO NUMEROUS OTHER FEDERAL FUNDING STATUTES AFFECTING EDUCATIONAL INSTITUTIONS. 22

III. THE STATE COURT FAILED TO IDENTIFY A RIGHT THAT IS ACTIONABLE UNDER § 1983..... 25

CONCLUSION 29

TABLE OF AUTHORITIES

FEDERAL CASES

Belanger v. Nashua, N.H. Sch. Dist., 856 F. Supp. 40 (D.N.H. 1994) 8

Blessing v. Freestone, 520 U.S. 329 (1997)...26, 27, 28

Fay v. South Colonie Cent. Sch. Dist., 802 F.2d 21 (2d Cir. 1986) 5, 20

Gundlach v. Reinstein, 924 F. Supp. 684 (E.D. Pa. 1996) 16

Jensen v. Reeves, 45 F. Supp. 2d 1265 (D. Utah 1999) 19

Lawson v. Edwardsburg Public Sch., No. 1:90-CV-68, 359811 (W.D. Mich. Nov. 14, 1990) 8

Maine v. Thiboutot, 448 U.S. 1 (1980) 26

Miami Univ. v. The Miami Student, 522 U.S. 1022 (1997) 13

Murrell v. Mount St. Clare Coll., No. 3:00-CV-90204, 2001 WL 16788766 (S.D. Iowa Sept. 10, 2001) 23

Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 233 F.3d 1203 (10th Cir. 2000), *rev'd*, No. 00-1073 (S. Ct. Feb. 19, 2002) 9, 21

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 21

Smith v. Duquesne Univ., 612 F. Supp. 72 (W.D. Pa. 1985) 19

Student Press Law Ctr. v. Alexander, 778 F. Supp. 1227 (D.D.C. 1991) 10, 13, 14

Suter v. Artist M, 503 U.S. 347 (1992) 26

Tarka v. Franklin, 891 F.2d 102 (5th Cir. 1989) 5, 20

United States v. The Miami Univ., 91 F. Supp. 2d 1132 (S.D. Ohio 2000) 13

Warner v. St. Bernard Parish Sch. Bd., 99 F. Supp. 2d 748 (E.D. La. 2000) 8

Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990) 26

STATE CASES

Doe v. *Gonzaga Univ.*, 24 P.3d 390, 400 (Wash. 2001) ("*Gonzaga*") ..... passim

State ex rel The Miami Student v. Miami Univ., 680 N.E.2d 956 (Ohio 1997) 13

FEDERAL STATUTES

20 U.S.C. § 1011h 24

20 U.S.C. § 1011i 24

220 U.S.C. § 1070 7

20 U.S.C. § 1071 8

20 U.S.C. § 1092(a) 24

20 U.S.C. § 1092(b) 24

20 U.S.C. § 1092(f) 22

20 U.S.C. § 1092(f)(1)(A) 23

20 U.S.C. § 1092(f)(1)(D) 23

20 U.S.C. § 1092(f)(1)(F) 23

20 U.S.C. § 1092(f)(1)(H) 23

20 U.S.C. § 1092(f)(3) 23

20 U.S.C. § 1092(f)(4)(A) 23

20 U.S.C. § 1092(f)(11) 24

20 U.S.C. § 1092(f)(13) 23

20 U.S.C. § 1092(f)(14)(A)(i) 24

20 U.S.C. § 1232(g) 4

20 U.S.C. § 1232g(a)(1)(A) 6, 7, 8, 17

20 U.S.C. § 1232g(a)(2) 6, 11, 17

20 U.S.C. § 1232g(a)(2) 11, 17

20 U.S.C. § 1232g(a)(4)(A) 7

20 U.S.C. § 1232g(b)(1) 6, 17

20 U.S.C. § 1232g(e) 6, 17

20 U.S.C. § 1232g(f) 17, 18, 19

20 U.S.C. § 1232g(g) 17

20 U.S.C. § 1400 7

20 U.S.C. § 6301 8

41 U.S.C. § 702 24

42 U.S.C. § 1983 ..... 1, 4, 25

34 C.F.R. § 99.3 ..... 4, 8

34 C.F.R. § 99.5 4

34 C.F.R. § 99.60(b)(1) 17

34 C.F.R. § 99.62 17

34 C.F.R. § 99.63 18

34 C.F.R. § 99.64(a) 18

34 C.F.R. § 99.64(b) 18

34 C.F.R. § 99.65 18

34 C.F.R. § 99.66(c) 18

34 C.F.R. § 99.67 ..... 18, 19

120 Cong. Rec. 14579 (1974) (Sen. Buckley) 11

120 Cong. Rec. 14581-82 (1974) (Sen. Buckley) 20

120 Cong. Rec. 14,587 (1974) (Sen. Ervin) 12, 20

120 Cong. Rec. 36537 (1974) 11

Pub.L. 93-568, § 2(a)(7), (10)(B) 21

Pub.L. 102-325, Title XV, § 1555(a) 10

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Dixie Snow Huefner & Lynn M. Daggett, *Commentary: FERPA Update: Balancing Access to and Privacy of Student Records*, 152 Ed. Law Rep. 469, 491 (2001) 12

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STATEMENT OF INTEREST OF *AMICI*[1]

Amici are national associations that represent public and independent primary, secondary, and higher education institutions and the educators who serve them. *Amici* believe that finding a private right of action under 42 U.S.C. § 1983 ("§ 1983") to adjudicate individual's claims arising under The Family Educational Rights and Privacy Act of 1974 ("FERPA") will disrupt a national system of education record administration which has been constructed in response to Congressional funding initiatives. *Amici* also believe that the enormous scope of FERPA means that recognition of a private right of action under § 1983 in association with practices and policies responsive to Congressional funding conditions will bring state and federal courts into virtually all facets of American education. Finally, the *amici* are concerned that the Court be fully aware of the numbers of parallel and/or similar federal statutes which fund education programs that will also be affected by a precedent set with regard to § 1983's applicability to FERPA.

Amicus, the American Association of Community Colleges ("AACC") is the primary advocacy organization for the nation's 1,100 two-year, degree-granting institutions. Organized in 1920, AACC promotes the causes of its member colleges through: legislative advocacy; monitoring of national issues and trends; collection, analysis, and dissemination of information; representation with other

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. This brief is submitted with the consent of all of the parties and letters of consent from counsel for the parties have been filed with the Clerk.

educational agencies and the national media; and research and publication of news and scholarly analysis.

The American Association of State Colleges and Universities ("AASCU") is a leading higher education association that represents more than 400 state colleges and universities across the United States and in Puerto Rico, Guam, and the Virgin Islands. Formed in 1961, AASCU monitors higher education policies at the national and state level and serves as a forum for examining and acting upon higher education issues. AASCU believes that public colleges and universities have a special role in our society – that of providing educational opportunity to everyone, regardless of economic condition, age, sex, or ethnic background.

Amicus American Council on Education ("ACE") represents all sectors of American higher education. Its approximately 1,800 members include a substantial majority of colleges and universities in the United States. Since its founding in 1918, ACE has sought to promote high standards in higher education, in the belief that a strong higher education system is the cornerstone of a democratic society. ACE's initiatives address issues of national importance, ranging from higher education quality and affordability to the responsiveness in other respects of colleges and universities to the nation's needs.

Founded in 1900, *amicus*, the Association of American Universities ("AAU") represents 62 public and private major research universities. AAU assists its members in developing national policy positions on issues relating to academic research and graduate and professional education. In addition, AAU provides members with a forum for discussing other institutional issues, such as undergraduate education.

Amicus, the Association of Jesuit Colleges and Universities ("AJCU") is a voluntary federation of the 28

Jesuit institutions of higher education in the United States. Formed in 1970, AJCU seeks to: improve the educational effectiveness of the institutions; articulate the mission and characteristics of Jesuit higher education and implement them in policy and practice; collaborate with national and international organizations; provide an educational forum for the exchange of experiences; and help members participate in federal and other national programs.

Amicus, the National Association of Independent Colleges and Universities ("NAICU") represents private colleges and universities on public policy issues before the federal government. Founded in 1976, NAICU serves its 900 members by promoting public policies that will assure all students the widest possible choice of institutions and programs; defending institutional integrity, freedom, and diversity; and supporting fiscal and tax policies that provide maximum encouragement for charitable giving to colleges and universities.

Amicus, the National Association of Independent Schools ("NAIS") is a voluntary membership organization that represents over 1,100 independent pre-collegiate schools nationwide. NAIS strives to provide its schools with appropriate principles of good practice, promoting high standards of academic excellence, affordable access to independent education, and diversified school communities. NAIS initiatives reflect areas of national concern, particularly when they involve the consequences of member schools accepting federal funds.

Amicus, the National Association of State Universities and Land-Grant Colleges ("NASULGC"), founded in 1887, is the nation's oldest higher education association. Representing more than 200 institutions – including public universities, land-grant institutions, and many of the nation's public university systems – NASULGC works to support the contributions that state and land-grant

universities make through teaching, research, and public service.

Founded in 1940, *amicus* National School Boards Association ("NSBA") is a not for profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members. These board members govern 14,772 local school districts that serve more than 46.5 million public school students – approximately 90 percent of all elementary and secondary school students in the nation.

SUMMARY OF ARGUMENT

Permitting individuals to sue under 42 U.S.C. § 1983 ("§ 1983") for violations of the Family Educational Rights and Privacy Act of 1974 ("FERPA" or "the Act") would create results Congress never intended and further complicate an already highly complex statute. Enacted in 1974, FERPA requires educational institutions and agencies receiving federal funds to comply with regulations that seek to safeguard the privacy of student educational records and insure that both parents and students[2] have access to those records in order to verify their accuracy. *See* 20 U.S.C. § 1232(g). After the adoption of several amendments and the issuance of numerous regulations and administrative interpretations, FERPA now influences most aspects of institutional life. *See, e.g.*, Leroy S. Rooker, Family

[2] FERPA defines "parent" broadly to include a natural parent, guardian, or person acting as a parent. 34 C.F.R. § 99.3. When a student becomes a legal adult, the consent required of a parent to access the student's education records transfers to the student herself. *Id.* at § 99.5. For simplicity, the term "parent" in this brief includes both parents under the definition in § 99.3, as well as students who have attained the age of eighteen.

Educational Rights and Privacy (FERPA), in *The Family Educational Rights and Privacy Act: A Legal Compendium* 515-16 (Steven J. McDonald ed., 1999) ("*FERPA Compendium*") (publication available from the National Association of College and University Attorneys) ("FERPA applies to all schools that receive funding under most programs administered by the Secretary of Education (section 99.1). At the post secondary level, virtually all private and privately owned religious schools receive applicable funding through the student financial aid programs of the Department. Any institution receiving such funding must comply with FERPA.").

With its broad impact on the educational institutions of the nation and its inherent conflicting interests, FERPA requires careful and well-informed consistency in the enforcement of its terms. Congress specifically structured the enforcement mechanisms in the Act to establish that level of administrative consistency by directing the Department of Education to establish a single, central, administrative office, the Family Policy Compliance Office (the "FPCO" or the "Office"), for the purpose of reviewing allegations of FERPA violations, identifying problems for institutions, and helping those institutions come into compliance.

With impressive unanimity, every court to consider the issue has held that FERPA does not provide a private right of action. *See, e.g., Tarka* v. *Franklin*, 891 F.2d 102, 104 (5th Cir. 1989); *Fay* v. *South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986).

The opinion of the Supreme Court of Washington, on appeal to this Court, acknowledged this point, but held that "the FERPA provision at issue here gives rise to a federal right enforceable under section 1983." *Doe* v. *Gonzaga Univ.*, 24 P.3d 390, 400 (Wash. 2001) ("*Gonzaga*"). This holding stems from an incomplete understanding of this Court's most recent precedent on the question of whether a

federal statute creates a right that may be the basis for a lawsuit brought under § 1983. Additionally, the decision in *Gonzaga* failed to consider the very significant disruption of the now well-established federal regulation of education records that must follow from empowering individuals to bring private challenges through the agency of § 1983 lawsuits. Because this result is one that Congress plainly did not intend, the decision of the Supreme Court of Washington should be reversed.

I. FERPA'S ELABORATE REGULATORY SCHEME INCORPORATES DETAILED REQUIREMENTS AFFECTING VIRTUALLY ALL ASPECTS OF THE OPERATION OF EDUCATIONAL INSTITUTIONS AT EVERY LEVEL.

FERPA applies to every institution that accepts funds from the United States Department of Education, as most educational institutions do. It applies to every "education record," and almost every item of information recorded in writing or otherwise in the possession of an educational institution is an "education record." FERPA conditions the receipt of federal education funding on adoption of not one but three requirements regarding education records. Not only must every recipient institution maintain the confidentiality of every education record, 20 U.S.C. §§ 1232g(a)(1)(A), (b)(1), it must also have in place policies or practices which afford parents access to education records, as well as an opportunity to challenge and correct them, *id.* at § 1232g(a)(2). In addition, educational institutions must "effectively inform[]" parents and students of their access and disclosure policies established by FERPA. *Id.* at § 1232g(e).

A. FERPA Reaches Every Level Of Education In The United States.

Whenever an institution accepts a dollar of federal education funding, FERPA follows. *See* 20 U.S.C. § 1232g(a)(1)(A) ("No funds shall be made available under any applicable program . . ."). Because federal funding for programs supporting education is broadly available, most institutions at every level of the educational process must comply with FERPA. Consideration of only a few of the many pertinent programs demonstrates that some form of federal funding for educational programs is received by public and private institutions at every level of the educational system. The Individuals With Disabilities Education Act, 20 U.S.C. § 1400 et seq., and Title I, 20 U.S.C. § 6301 et seq., provide support for public and private schools from kindergartens through high school. In the case of post-secondary education, FERPA's mandates follow such nearly ubiquitous federal financial aid programs as the Pell Grant, 20 U.S.C. § 1070, and Guaranteed Student Loan, 20 U.S.C. § 1071. As a practical matter, therefore, FERPA's conditions on receipt of federal funding control the maintenance and administration of education records in virtually all American educational institutions.

B. The Statutory Definition Of "Education Record" Incorporates Virtually All Documents Containing Personally Identifiable Information.

FERPA's reach extends to all recorded information "maintained by an educational agency or institution" which contains personally identifiable information "directly related to a student." 20 U.S.C. § 1232g(a)(4)(A). The breadth of this definition means that FERPA sweeps up not just transcripts and evaluations, but also any other recorded information relating to the student in an identifiable way contained in an educational institution's files. Moreover, the

definition covers information recorded on any form of storage media from paper to a computer's hard drive. *See* 34 C.F.R. § 99.3.

Because the definition is locational, if the record is "maintained by an educational agency," it does not matter who wrote it. Thus, student employment records, computer usage records, and photo files that contain information about any identifiable student of the institution are "education records." *See, e.g., Belanger* v. *Nashua, N.H. Sch. Dist.*, 856 F. Supp. 40, 50 (D.N.H. 1994) (juvenile court records kept in school attorney's office and used for school purposes are maintained by educational agency). A parent's letter to a teacher objecting to inclusion of certain matters in the curriculum offered to her child's class was held to be an education record and therefore, beyond the reach of the press when the parent ran for the school board. *Warner* v. *St. Bernard Parish Sch. Bd.*, 99 F. Supp. 2d 748, 753 (E.D. La. 2000). *But see Lawson* v. *Edwardsburg Public Sch.*, No. 1:90-CV-68, 359811, at *1 (W.D. Mich. Nov. 14, 1990) (release of fact that former student had sued school not a violation of FERPA because the information released did not pertain to plaintiff's attendance at school).

The necessary consequence of the broad acceptance of federal education funds by institutions of all levels combined with a statutory definition that covers almost any form of recorded information concerning students maintained by an educational institution is that there is a federal record keeping policy which affects almost all the educational institutions in the United States. Accordingly, the Washington Supreme Court's general declaration that "FERPA does create individual rights privately enforceable under section 1983" can only be understood to imply judicial supervision of the entire scope of the federally regulated educational record system. *Gonzaga*, 143 P.3d at 401.

C. FERPA's Three Primary Conditions On Funding Involve It In All Aspects Of Educational Programs.

Taken together, FERPA's three primary conditions on education funding significantly affect numerous interactions between educational institutions and their students. FERPA requires recipients to have in place policies permitting parents and emancipated students to review records, to control release of information in records, and to seek correction of the contents of records. Although FERPA is denominated a record-keeping policy, a review of the cases and controversies that have arisen under FERPA makes clear that the statute penetrates far more deeply into educational activities. The facts in *Owasso Independent School District No. I-011* v. *Falvo*, 233 F.3d 1203 (10th Cir. 2000), *rev'd*, No. 00-1073 (S. Ct. Feb. 19, 2002), exemplify how control over access to information can control instruction in the classroom. There, the United States Court of Appeals for the Tenth Circuit upheld a parent's objection that use of the teaching device of having students grade each others work violates FERPA's prohibition against unauthorized release of an education record (the grade). *Id.* at 1219. But for this Court's reversal, the instructional technique would have been judged, not on the basis of its efficacy as a teaching tool, but rather on the basis of an interpretation of a federal record-keeping policy.

1. Confidentiality

A succession of enactments followed by administrative and judicial interpretation followed by corrective statutory amendments has been required to arrive at a fairly broadly accepted view of FERPA's application to the generality of recurring record keeping issues. While the original drafters of FERPA almost certainly did not foresee the possibility that institutions would respond to requests for information on student misconduct by pointing to FERPA,

FPCO's interpretations and judicial decisions have upheld that use of the statute. In the most dramatic of the confrontations between the public press and FERPA, a district court enjoined FPCO from asserting that FERPA prohibited the release of police logs containing personally identifiable information concerning criminal conduct by students. *Student Press Law Ctr.* v. *Alexander*, 778 F. Supp. 1227 (D.D.C. 1991). Congress responded to the uproar caused by the successful use of FERPA to limit access to conduct records by amending the statute to remove police records from the definition of education records. Pub.L. 102-325, Title XV, § 1555(a), July 23, 1992, 106 Stat. 840.

The more predictable tension between parental desire for confidentiality of a record perceived to be disadvantageous and a school's desire to give access to the record to those involved in the education of the student in question provokes a continuing need for interpretation. The resulting dilemmas institutions bring to FPCO for advice reveal a series of bona fide difficulties of interpretation far better suited to the advisory process provided by FERPA than to lawsuits by individuals.

2. Parental Access

The condition that a policy be in place permitting parents and emancipated students to access any personally identifiable information concerning a student is FERPA's most invasive mandate and has generated the greatest amount of litigation and administrative inquiry. One contentious issue involves the definition, for purposes of access, of the terms "parent" and "student." The elaboration of these definitions has been an evolutionary process involving regulations and interpretations by the FPCO, with an outcome that ultimately achieved general acceptance. An affirmance of the Washington Supreme Court's unlimited proposition that § 1983 makes private litigation available on

this issue will likely result in regional definitions of "parent" and "student" at variance with those currently in place.

3. Challenge and Correction

FERPA's condition requiring recipients to adopt a policy affording parents and emancipated students the opportunity to challenge the accuracy of the student's education records presents another example of the tightrope walked in the drafting of the statute. One of Senator Buckley's original objectives in proposing remedial legislation was to create a means by which a parent could point out inaccuracies and out-of-date material in a child's records. 120 Cong. Rec. 14579 (1974) (statement of Sen. Buckley) ("When parents and students are not allowed to inspect school records and make corrections, numerous erroneous and harmful material [sic] can creep into the records."). At the same time, the risk of creating a wholly unacceptable vehicle through which students could litigate grades assigned in class was apparent to Congress. 120 Cong. Rec. 36537 (1974). The solution to this dilemma was found in the use of wording which distinguishes the requirement of a process to challenge the content of a record from a right to have the record corrected. *See* 20 U.S.C. § 1232g(a)(2). The process for making a challenge is provided, but the educational institution has full discretion to resist the desired change, and if it does, FERPA requires only that the institution include the parents' rebuttal in the student's education record.

In light of the entirely administrative nature of the remedy Congress provided in § 1232g(a)(2), an ill-defined statement that "FERPA does create individual rights privately enforceable under section 1983," *Gonzaga*, 143 P.3d at 401, is a matter of great concern to the country's educational institutions. Undoubtedly, a plaintiff will seek to persuade the courts that, under a *Wilder* analysis, an opportunity to challenge a record is a dead letter unless there

is a judicially enforceable right to correct the record. Implying such a right will allow precisely what Congress determined should not be a remedy for FERPA violations. *See* 120 Cong. Rec. 14,587 (1974) (Sen. Ervin) ("The penalties [sic] for noncompliance with this act would be a loss of the Federal funds that had been made available to the school.").

D. An Unintended Consequence Of FERPA's Imposition of Conditions On Funding Has Been To Involve Educational Institutions In Challenges By Interests Desiring to Obtain Access To Information In Education Records.

One of the primary effects of the passage of FERPA was to make the country's educational institutions unwilling stakeholders in a struggle between Congress and the FPCO, on the one hand, and, on the other, those interests whose access to information in education records was cut off by policies adopted in order to conform to FERPA's conditions on funding. In that capacity, educational institutions found themselves facing contradictory and frustrating directives from judicial bodies, each of which was possessed of the authority to compel compliance with its orders. *See, e.g.*, Dixie Snow Huefner & Lynn M. Daggett, *Commentary: FERPA Update: Balancing Access to and Privacy of Student Records*, 152 Ed. Law Rep. 469, 491 (2001) ("FERPA continues to contain numerous internal and external ambiguities and conflicts, and it presents significant and often unclear burdens to schools").

The most dramatic example of the dilemma facing educational institutions when different courts reach diametrically opposite conclusions as to the proper interpretation of a law involves the efforts of student newspaper editors to obtain information concerning criminal activities contained in campus police logs and similar records. In litigation which produced rulings from the

Supreme Court of the State of Ohio as well as from the Federal District Court in Ohio, student editors sought to obtain disciplinary records from campus officials. In the first stage of the litigation, the Supreme Court of Ohio ruled that "university disciplinary records are not 'education records' under . . . FERPA." *State ex rel The Miami Student* v. *Miami Univ.*, 680 N.E.2d 956, 958 (Ohio 1997). In accordance with this conclusion, the Ohio Supreme Court directed the university to make records of student disciplinary records available to the student newspaper. Faced with a contrary ruling from the United States Department of Education, the university applied to this Court for a writ of certiorari, which was denied. *See Miami Univ.* v. *The Miami Student*, 522 U.S. 1022 (1997). By this point, the controversy had been expanded to include a national newspaper, which became the primary party seeking enforcement of the Ohio Supreme Court's order. The Ohio State University also became embroiled in the controversy. To vindicate its interpretation of FERPA, the United States Department of Education then commenced an action in the United States District Court for the Southern District of Ohio, which enjoined the defendant universities from releasing student disciplinary records. *United States* v. *The Miami Univ.*, 91 F. Supp. 2d 1132 (S.D. Ohio 2000).

In an earlier phase of the newspapers' quest for information about conduct on campus, the Student Press Law Center brought suit in federal district court to enjoin the Department of Education from applying FERPA so as to prevent educational institutions from releasing personally identifiable information about students contained in the records of campus law enforcement agencies. *Student Press Law Center* v. *Alexander*, 778 F. Supp. 1227 (D.D.C. 1991). In that case, the court undertook to interpret FERPA on its own, rather than await passage of pending amendatory legislation exempting the records of campus law enforcement agencies from the coverage of FERPA. After

applying a balancing test weighing First Amendment rights more heavily than the confidentiality endorsed by FERPA, the district court issued the requested injunction. *Alexander*, 778 F. Supp. at 1234.

A somewhat analogous issue has arisen in connection with press interest in disputes between educational institutions and students having rights under FERPA. The issue implicating compliance with FERPA arises when a parent or student referred to in an education record makes public complaints about the educational institution holding the record and a reporter approaches the institution for comment. Initially by FPCO interpretation, and subsequently by amendment to FERPA, an exception to the prohibition on non-permissive release of education records was created in instances of implied waiver; that is, when the subject of the record is deemed to have waived confidentiality by taking an adversarial position against the educational institution. *See* Letter from the FPCO to Dr. Daniel Nathans, Interim President, Johns Hopkins University (Feb. 19, 1997), *FERPA Compendium*, at 206. Not surprisingly, the breadth of this implied waiver has been tested in complaints brought to FPCO. *See, e.g.*, Letter from FPCO to Dr. Hoke Smith, President, Towson State University (June 22, 1998), *FERPA Compendium*, at 207 (implied waiver not present when release of information is to one not in a special relationship with the university and litigation not yet commenced by student).

These cases illustrate how FERPA litigation already creates dilemmas for educational institutions. Expanding the role of litigation by affirming the jurisdiction of the courts to hear private rights of action under § 1983 for alleged violations of FERPA will further distract educational institutions from the performance of their important societal mission. Moreover, private litigants may erode the coherence of the national scheme of interpretation and

enforcement that Congress codified in the language of the statute.

E. The Rapid Evolution Of Information Processing Technology And The Relative Age Of FERPA Ensure A Constant Need For New Interpretation.

Most of FERPA's statutory language was written in 1974, long before computers and information technology became the mainstay of academic record keeping. Senator Buckley and his colleagues had no reason to expect that so-called "distance education" might provide the sole contact between certain students and the institutions in whose programs they enroll or that institutions might want to make grades and evaluations available via a computer link. Along with those technological advances implicating "education records" goes the already common practice of using computer links to administer standardized testing and file applications for admission. In the midst of the rapid pace of these developments, the need to bring FERPA up to date presents a daunting challenge to educational institutions seeking to integrate new technologies and conditions on the receipt of federal funding. *Cf.* Privacy and the Handling of Student Information in the Electronic Networked Environment of Colleges and Universities, CAUSE Whitepaper (1997), *FERPA Compendium*, at 323.

With what we know today, it seems obvious that the development of a "Student Loan Clearinghouse" will require extrapolation from the existing language of FERPA to determine whether the release of student records to a computer-based service company is permissible. *See* Letter from the FPCO to Daniel R. Boehmer, National Student Loan Marketing Association (Apr. 19, 1993), *FERPA Compendium*, at 221. Nor does the precise wording of FERPA enable an institution to determine whether it is in compliance with the statute if it acts upon a student's request

for the issuance of a transcript, when that request is received over a computer link. *See* Letter from the FPCO to Dr. David S. Yeh, Cornell University (June 30, 1994), *FERPA Compendium*, at 191.

The importance of this developmental process to the question before the Court lies in the success of the centralized interpretation and enforcement which Congress crafted. Placing the interpretation of FERPA in the hands of trial courts of the state and federal systems risks unfortunate consequences for the evolution of the role of important new information-sharing technologies in educational record-keeping. Although each judge confronted with a request to prohibit institutions from using a new technique of information storage or transmission can be expected to use his or her best judgment, there is little hope that the eventual outcome will be a unified and consistent national approach.

F. The Wording Chosen By Congress To Express The Conditions Which It Placed Upon The Receipt Of Federal Funding By Educational Institutions Takes Into Account The Often Ambiguous Nature Of Educational Records And Their Use In Schools And Colleges.

FERPA imposes no sanction for a single failure to provide access, maintain confidentiality, or hear an argument in favor of correction. *See Gundlach* v. *Reinstein*, 924 F. Supp. 684, 692 (E.D. Pa. 1996) ("[W]e glean no unambiguous intention on the part of the Congress to permit the invocation of § 1983 to redress an individual release of records allegedly covered by FERPA."). Rather, before commencing any enforcement action, FERPA requires the Department of Education to find that a pattern of proscribed action has been identified and an opportunity to cure has lapsed without compliance.

> The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken *only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.*

20 U.S.C. § 1232g(f) (emphasis added).

FERPA specifies a violation as: (1) having "a policy of denying" parents access to education records, *id.* at § 1232g(a)(1)(A); (2) failing to provide "an opportunity for a hearing . . . to challenge the content" of education records, *id.* at § 1232g(a)(2); (3) having "a policy or practice of permitting the release of education records . . . without the written consent" of the student or parents involved, *id.* at § 1232g(b)(1); and (4) failing to "effectively inform[]" parents and students of their ability to access records and prevent their release, *id.* at § 1232g(e).

To enforce these standards, FERPA provides that "[t]he Secretary [of the Department of Education] shall establish or designate an office and review board" for the purpose of investigating complaints "concerning alleged violations" of the statute. 20 U.S.C. § 1232g(g). The administrative regulations implementing FERPA establish the FPCO for that purpose. *See* 34 C.F.R. § 99.60(b)(1). The regulations create a process for aggrieved individuals to communicate with FPCO concerning an institution's alleged failure to comply with FERPA. *See id.* (designating FPCO to "[i]nvestigate, process, and review complaints and violations" under FERPA). The regulations empower FPCO to require institutions to submit reports with "information necessary to resolve complaints" under the Act. *Id.* at § 99.62. Complaints may be filed with FPCO by parents or

eligible students, *id.* at § 99.63, and "must contain specific allegations of fact giving reasonable cause to believe that a violation" of FERPA has occurred, *id.* at § 99.64(a). FPCO investigates complaints to determine whether institutions or agencies have failed to comply with FERPA. *Id.* at § 99.64(b).

If FPCO decides to initiate an investigation regarding a complaint, it must inform the institution involved of the substance of the alleged violation and ask the institution to submit a written response to the complaint. 34 C.F.R. § 99.65. If the FPCO finds that the institution has failed to comply with the FERPA's requirements, the FPCO is obliged to inform the institution of the specific steps it must take to attain compliance and to provide "a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily." 34 C.F.R. § 99.66(c). Only if the institution does not comply within that reasonable amount of time may the Department of Education terminate the institution's eligibility for federal funding or take other enforcement action. 20 U.S.C. § 1232g(f) (stating that "action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determine that compliance cannot be secured by voluntary means"); 34 C.F.R. § 99.67.

The regulatory scheme places two fundamental constraints upon the imposition of sanctions for violations of FERPA. First, the secretary may not commence administrative action unless an institution has violated a policy or practice of violating the access or disclosure standards. The terms "policy" and "practice" demonstrate that more than one disclosure or access infraction is necessary for there to be a violation of FERPA. Because FPCO is authorized to act upon proof of a "violation" of FERPA, read together, the statute and the regulations indicate that institutions will not be sanctioned for a single

instance of noncompliance. Second, the Department of Education may not bring an action to terminate federal financial assistance unless it has first afforded an institution an opportunity to come into compliance and then determined that the institution's compliance cannot be secured through voluntary means. 20 U.S.C. § 1232g(f); 34 C.F.R. § 99.67.

A court should not simply disregard the strongly deliberative nature of this process, as did the Supreme Court of Washington, particularly not when Congress constructed that process over time through a series of legislative amendments. It is not too much to say that Congress has carefully crafted a means of letting the punishment fit the crime. Because of the range of institutions covered by FERPA's mandates from the most sophisticated universities to tiny rural school districts, Congress required that termination will only be imposed when there is a finding that the mandates of FERPA are understood *and* noncompliance is deliberate. In sum, recognizing that the ambiguities arising from countervailing interests would make compliance difficult, Congress crafted a remedial scheme characterized by administrative forbearance. One court to consider this remedial scheme has concluded:

> Against this background, it is clear that FERPA was adopted to address systematic, not individual, violations of students' privacy and confidentiality rights through unauthorized releases of sensitive educational records. The underlying purpose of FERPA was not to grant individual students a right to privacy or access to educational records, but to stem the growing policy of many institutions to carelessly release student records.

Smith v. *Duquesne Univ.*, 612 F. Supp. 72, 80 (W.D. Pa. 1985); *see also Jensen* v. *Reeves*, 45 F. Supp. 2d 1265,

1276 (D. Utah 1999) ("FERPA was adopted to address systematic, not individual, violations of students' privacy by unauthorized releases of sensitive information in their educational records.").

The importation of a private right of action stands that scheme on its head. As can be seen from the decision below, a single violation can produce a reflexive result. In the instant case, the Washington court did not find that the institution understood that FERPA's limitations supersede the state requirements of a candid assessment of the morals of a candidate for licensure; nor did it even consider an inquiry into whether the institution would have voluntarily undertaken to adjust its actions so as to comply with FERPA.

The argument that the starkness of the facts found by the jury in *Gonzaga* justifies a § 1983 remedy ignores the care Congress took to avoid that result. Senator Buckley described far more harmful cases in his arguments in favor of the original bill, 120 Cong. Rec. 14581-82 (1974) (Sen. Buckley) (describing program identifying eighth-grade children as potential drug abusers), yet the Congressional debate was equally forceful in its understanding that the remedy for violations of the statute would be a loss of federal funding. 120 Cong. Rec. 14,587 (1974) (Sen. Ervin) ("The penalties [sic] for noncompliance with this act would be a loss of the Federal funds that had been made available to the school."). When Senator Ervin asserted that the penalty for noncompliance was a loss of federal funds, omitting any mention of a private right of action, Senator Buckley, with time to respond, did not attempt to suggest that a private right of action would also be available under the statute. The courts which have considered the question found no legislative intent to create a private right of action. *See, e.g.*, *Tarka*, 891 F.2d at 104; *Fay*, 802 F.2d at 33.

Shortly after FERPA's original enactment, Congress clarified its intent that enforcement of the statute should be

centralized in a national office. *See* Pub.L. 93-568, § 2(a)(7), (10)(B) (adding language, "Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department [of Education]"). By doing so, Congress specifically prohibited regional offices of the Department of Education from issuing interpretations or enforcing the Statute. Empowering state trial courts and federal district courts to play these roles through recognition of a private right of action under § 1983 vitiates that policy and the system established to institute it.

Congressional silence militates against the extension of § 1983 jurisdiction to FERPA for another reason. If Congress intended for FERPA to make the states liable for a new federal tort in the nature of maladministration of education records, it said nothing about that intention during the many pages of the Congressional Record devoted to FERPA's gestation. Under controlling jurisprudence, which the Supreme Court of Washington might have considered had Gonzaga University been a public institution, Congressional silence concerning the imposition of a significant burden as a condition of receipt of federal funds is sufficient to defeat any implication of intent to create a right of action imposing such an obligation. Under this "contract" analysis, Congress is obliged to express its intent quite clearly when placing restrictions on federal financial assistance. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 24 (1981) ("Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds."). Neither the language of FERPA, its legislative history (which is to the contrary), nor the regulations express Congress's intent to create a federal right actionable under § 1983. *Cf. Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, *supra*, slip op. at 5-6 ("[The] interpretation [of the Court of Appeals in *Falvo*] would effect a drastic alteration of the

existing allocation of responsibilities between States and the National Government in the operation of the Nation's schools. We would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation.").

II. THE ANALYSIS ADOPTED BY THE WASHINGTON SUPREME COURT RISKS EXTENDING § 1983 JURISDICTION TO NUMEROUS OTHER FEDERAL FUNDING STATUTES AFFECTING EDUCATIONAL INSTITUTIONS.

Any consideration of the availability of § 1983 actions to enforce private "rights" under FERPA should take cognizance of the impact on educational institutions of applications for the same jurisdiction to enforce "rights" arising under other education funding statutes. In addition to FERPA, educational institutions must comply with federal statutes governing information reporting practices, crime prevention, and drug and alcohol abuse. Under the generalized rationale of the opinion below, many of these statutes might also give rise to an enforceable federal "right" that would expose institutions to private liability they could not possibly have foreseen. For example, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act conditions the receipt of federal funding on compliance with a complex regimen requiring annual reporting of crime statistics, warnings following incidents of crime on and near institutional campuses, and adoption of policies regulating institutional reaction to criminal acts on campus. *See* 20 U.S.C. § 1092(f) (the "Clery Act"). More particularly, as a condition to receiving the same types of financial aid covered by FERPA, the Clery Act requires institutions to report, among other items, a statement of current security policies, a statement of programs designed to inform students and employees about crime, statistics

concerning the occurrence of crime on campus (enumerated by offense), separate statistics concerning the occurrence of hate crimes, and a statement of policy regarding the possession of alcohol. *Id.* at § 1092(f)(1)(A),(D),(F),(H). The Clery Act also requires institutions to maintain a daily log recording crimes reported to campus police, *id.* at § 1092(f)(4)(A), and to "make timely reports to the campus community on crimes considered to be a threat to other students and employees," *id.* at § 1092(f)(3). Like FERPA, the Clery Act attempts to regulate colleges and universities on a national scale and to achieve consistency in institutional practices concerning campus crime, its prevention, and reporting. Finally, the Clery Act provides its own enforcement mechanism through the imposition of a civil penalty by the Secretary of Education. *Id.* at § 1092(f)(13).

These parallels between the Clery Act and FERPA suggest that, under the rationale of the Washington Supreme Court, it would be difficult to distinguish the claim that court allowed to proceed based upon FERPA rights from a claim for similar jurisdiction to vindicate "rights" created by the Clery Act. For example, a student might rely on an affirmance on the same broad grounds relied upon below to contend that an institution's failure to disclose particular crimes as part of Clery Act reporting violated her federal "right" to accurate crime statistics. Indeed, precisely that sort of claim of noncompliance with the Clery Act has been asserted as the basis for a student's claim against a university, albeit not in the § 1983 context. *See, e.g.*, *Murrell* v. *Mount St. Clare Coll.*, No. 3:00-CV-90204, 2001 WL 16788766, at *7 (S.D. Iowa Sept. 10, 2001) (finding that college had a "duty," under the Clery Act, to report its crime statistics accurately, but finding that student's claim for negligent misrepresentation failed because student could not show that she relied on the college's misreported crime statistics in choosing to enroll).

Finding an enforceable federal right in the Clery Act would create the same problems for the country's educational institutions as would a similar finding under FERPA. Even more than FERPA, the Clery Act is an amalgam of interrelated and highly complex legislative funding conditions. Reflecting that fact, Congress chose not to include a private right of action, *see* 20 U.S.C. § 1092(f)(14)(A)(i) ("Nothing in this subsection may be construed to . . . create a cause of action against any institution of higher education or any employee of such an institution for any civil liability."), and wrote clear language into the Clery Act to create a national enforcement and interpretation scheme policed by the Secretary of Education, *id.* at § 1092(f)(11), (14) (vesting power in the Secretary to report noncomplying institutions to "the appropriate committees of Congress," and authorizing the Secretary to impose civil penalties for noncompliance). Subjecting institutions to private lawsuits would add an unforeseen consequence to their acceptance of federal funding, as well as bring federal courts into the business of policing compliance with a federal statute that Congress plainly intended to be enforced by administrative agencies.

The Clery Act is only the most obvious parallel to FERPA. Other similar statutes with which educational institutions must comply in order to receive federal funding include The Collegiate Initiative to Reduce Binge Drinking and Illegal Alcohol Consumption Act, 20 U.S.C. § 1011h, a statute regarding drug and alcohol prevention, 20 U.S.C. § 1011i, and The Drug Free Workplace Act, 41 U.S.C. § 702. In addition, institutions are required to publish information about their costs and the availability of federal financial assistance, 20 U.S.C. § 1092(a), and must provide exit counseling regarding every student's federal debt burden upon their graduation, 20 U.S.C. § 1092(b). All of these statutes, like FERPA, plainly benefit individual students (and, in some instances, parents) by creating system-wide

policies and procedures that maximize information available to them and attempt to create a safe educational environment.

What must be considered is whether the undoubted benefit to students, in general, should give rise to an entitlement to judicial intervention, when such individual interventions will have the effect of defeating the legislative purpose of uniform and unified enforcement. Congress has shown its understanding of the fact that there must be a balancing between the creation of a policy which benefits the population of students and the creation of a right which will necessarily put educational institutions at risk for expenditures of money, time and effort that they cannot afford to make. In essence, Congress has chosen the carrot and not the stick, having observed that the stick could too quickly place unwarranted and, perhaps ruinous, burdens on educational institutions. Finding § 1983 jurisdiction to enforce the "rights" in FERPA, the Clery Act, and the other federal funding legislation is to reverse the Congressional determination and add the stick - without concern for the ultimate consequences to either students in general or educational institutions. Without suggesting that the courts should venture into the realm of legislation, it can be asked whether requiring institutions to defend against private lawsuits for small, individual infractions of these statutes is an efficient or logical way to allocate America's educational resources. When it drafted these complicated regulatory regimes, Congress plainly thought it was not.

III. THE STATE COURT FAILED TO IDENTIFY A RIGHT THAT IS ACTIONABLE UNDER § 1983.

42 U.S.C. § 1983 provides, in pertinent part: "Every person who, under color of any statute . . . of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

injured in an action at law." 42 U.S.C. § 1983. The Court has interpreted the phrase "and laws" to permit individuals to bring § 1983 actions for deprivations of federal statutory rights as well as deprivations of constitutional rights. *See Maine* v. *Thiboutot*, 448 U.S. 1, 4 (1980). "In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing* v. *Freestone*, 520 U.S. 329, 340 (1997). *See also Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990) ("Section 1983 speaks in terms of *rights*, privileges, or immunities, not violations of federal law.") (citations and internal quotation marks omitted). Accordingly, permitting a private right of action under § 1983 to enforce FERPA requires an antecedent finding that FERPA creates a right that is enforceable under § 1983.

A series of decisions of the Court established and elaborated the standard for determining whether a federal statute creates a right that is actionable under § 1983. In *Wilder*, the Court employed a three-part test. *See* 496 U.S. 498 (1990). The statutory provision must be intended to benefit the plaintiff; it must reflect a binding obligation on conduct rather than a mere congressional preference; and the right must not be so "vague and amorphous such that it is beyond the competence of the judiciary to enforce." *Id.* at 509 (internal quotation marks omitted). In *Suter* v. *Artist M*, 503 U.S. 347, 363 (1992), the Court indicated that courts must subject the language of a federal statute to "[c]areful examination" before concluding that it creates a right enforceable through § 1983. Based upon such an examination, *Suter* held that the Adoption Assistance and Child Welfare Act ("Adoption Act") did not confer "an enforceable private right on its beneficiaries" and therefore declined to allow an action under § 1983 to enforce the provisions of the Adoption Act. 503 U.S. at 364.

Blessing refined the approaches in *Wilder* and *Suter* by emphasizing the necessity of identifying a particular

actionable right. Specifically, in deciding whether Title IV-D of the Social Security Act could be enforced under § 1983, the Court criticized the court of appeals for adopting a "blanket approach." *Blessing*, 520 U.S. at 344. The court of appeals had reasoned that Title IV-D's language requiring states to make "reasonable efforts" was intended generally to operate for the benefit of the plaintiff class and ended the inquiry with that conclusion. Ruling that the court of appeals had erred in finding that Title IV-D of the Social Security Act generally creates rights enforceable under § 1983, the Court stated, "It is readily apparent that [in addition to the requirement of substantial compliance] many other provisions of that multifaceted statutory scheme do not fit our traditional three criteria for identifying statutory rights." *Id.* The Court rejected the generalized approach used by the court of appeals and stressed that identification of a particular right created within the overall statutory scheme was a prerequisite to resolving the question whether enforcement under § 1983 was appropriate. The Court also decided that it could not even address, much less resolve, that question because the record did not allow it to identify with sufficient clarity the rights on which the plaintiffs based their claim. *Id.* at 346. Accordingly, the Court remanded the case to the district court "in order to determine exactly what rights, considered in their most concrete, specific form, respondents are asserting." *Id.*

It is apparent that the Washington Supreme Court ignored the teaching of *Blessing*. Tellingly, it is not even clear from the court's opinion what federal right the court managed to locate in FERPA's vast regulatory scheme. In what could be characterized as the holding of the opinion, the court stated, "In the instant case, FERPA does create individual *rights* privately enforceable under section 1983." *Gonzaga*, 24 P.3d at 401 (emphasis added). However, the court never enumerated those "rights" or defined them individually. The court's use of the plural term "rights" is

particularly curious because, in the second part of its *Wilder* analysis, the court stated, "second, the *right* is not so 'vague and amorphous' that the court cannot enforce it." *Id.* (emphasis added). In addition, the court's choice of words at the commencement of its *Wilder* discussion suggests that it understood it was being asked to determine the existence of one right: "John Doe argues that Gonzaga violated FERPA by disclosing confidential information." *Id.*

The confusion of plural and singular right(s) makes it impossible to determine whether the Washington Supreme Court held that FERPA creates a right not to have one's education records improperly disclosed, or whether the court held, more broadly, that § 1983 is available to enforce any right created by FERPA. Under the discussion in *Blessing*, the distinction is critical. *Blessing*, 520 U.S. at 346. At the very least, this failure to articulate with specificity the "right" or "rights" to which the opinion below was addressed requires a remand for clarification.

The Washington court's failure to focus its inquiry is particularly inappropriate in the context of FERPA. The court had before it facts found by a jury that, as shown by the verdict on the common law counts, were actionable conduct under widely accepted and long established rules of law. It was not only impermissible but also dangerous for the Washington court to conclude that, because this actionable conduct was also a violation of FERPA, any violation of FERPA is generally actionable under § 1983.

The danger of so facile an interpretation is made all the greater because of the degree to which FERPA has come to permeate education in America, the dilemmas of interpretation the statute already poses for educational institutions at all levels, the precarious balance the law strikes between personal privacy and access to information, and the limited, phased remedy for violations so painstakingly crafted by Congress.

CONCLUSION

For the reasons set forth above, the decision of the Supreme Court of Washington should be reversed.

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MAR 27 2002

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

GONZAGA UNIVERSITY and ROBERTA S. LEAGUE,

Petitioners,

—v.—

JOHN DOE,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE WASHINGTON SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF WASHINGTON, IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. Congress Correctly Recognized The Strong Individual Interest Of Students And Their Families In Protecting The Privacy Of Education Records 7

A. Educational Institutions Compel Families to Disclose Intimate Personal Information That Could Cause Serious Harm If Misused 7

B. Congress Viewed Educational Privacy As An Individual Civil Right 11

C. The Individual Privacy Rights That Congress Codified in FERPA Cannot Be Fully Protected Without A Private Cause of Action 17

1. Agency Enforcement Cannot Provide Immediate Injunctive Relief or Compensation for Past Injuries . . . 17

2. Withholding Of Federal Funds Is A Far Harsher Remedy Than Tort Liability And Is Not A Realistic Deterrent 19

Page

3. Conflicting Court Interpretations Of FERPA Are Unlikely 21

D. Affirming the Majority Rule Will Not Result In the Dangers Asserted By Gonzaga and its *Amici* 23

1. There Has Not Been, And There Will Not Be, A Flood Of FERPA Damages Litigation Against School Districts Under §1983 23

2. FERPA Frees Educational Institutions From Competing Demands Over Education Records 25

3. The Concerns Of *Amici* Regarding Media Access To Student Records Are Misplaced 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144,
45 F.Supp. 2d 664 (D. Minn. 1999) 16, 22, 24

Bates v City of Little Rock,
361 U.S. 516 (1960) 8

Belanger v. Nashua, New Hampshire, School District,
856 F.Supp. 40 (D.N.H. 1994) 10, 16, 17, 24

Blessing v. Freestone,
520 U.S. 329 (1997) 5, 17, 22

Boman v. Bluestem Unified Sch. Dist.,
2000 WL 297167 (D. Kan. Jan. 28, 2000) 11

Brown v. City of Oneonta,
106 F.3d 1125 (2d Cir. 1997),
cert. denied, __ U.S. __,
122 S.Ct. 44 (2000) 16

Chevron v. Natural Resources Defense Council,
467 U.S. 837 (1984) 21, 26

Chrysler Corp. v. Brown,
441 U.S. 281 (1979) 27

Connors v. Board of Education of the Indian Creek Local Sch. Dist.,
No. C-2-00-0990 (S.D. Ohio 2000) 11, 19

Cort v. Ash,
422 U.S. 66 (1975) 23

Page

Cullens v. Bemis,
979 F.2d 850 (table),
1992 WL 337688 (6th Cir. Nov. 18, 1992) 16

Doe v. Knox County Board of Education,
918 F.Supp. 181 (E.D. Ky. 1996) 16

Edelman v. Lynchburg College,
No. 00-1072 (March 19, 2002) 28

Falvo v. Owasso Ind. Sch. Dist. No. I-011,
233 F.3d 1203 (10th Cir. 2000),
rev'd on other grounds,
__ U.S. __, 122 S.Ct. 934 (2002) 16

Fay v. South Colonie Cent. Sch. Dist.,
802 F.2d 21 (2d Cir. 1986) 16, 23, 24

Francois v. University of the Dist. of Columbia,
788 F.Supp. 31 (D.D.C. 1992) 16, 22

Frazier v. Fairhaven Sch. Comm.,
276 F.3d 52 (1st Cir. 2002) 23

Girardier v. Webster Coll.,
563 F.2d 1267 (8th Cir. 1977) 23

Goodreau v. Rector and Visitors of the Univ. of Virginia,
116 F.Supp.2d 694 (W.D. Va. 2000) 16, 24

Gundlach v. Reinstein,
924 F.Supp. 684 (E.D. Penn. 1996),
aff'd without opinion,
114 F.3d 1172 (3d Cir. 1997)(table) 16, 22

Klein Indep. Sch. Dist. v. Mattox,
830 F.2d 576 (5th Cir. 1987) 22

Page

Krebs v. Rutgers,
797 F.Supp. 1246 (D.N.J. 1992) 9, 16, 17, 19, 20

LaVine v. Blaine School District,
257 F.3d 981 (9th Cir. 2000),
reh'g denied, 2002 WL 109285 (Jan 29, 2002) 11

Lewin v. Med. Coll. of Hampton Roads,
931 F.Supp. 443 (E.D. Va. 1996),
aff'd, 131 F.3d 135 (4th Cir. 1997) 16, 22, 24

Maine v. Thiboutot,
448 U.S. 1 (1980) 5, 29

Maynard v. Greater Hoyt School District No. 61.4,
876 F.Supp. 1104 (D.S.D. 1995) 10, 16, 20, 22, 24

Meyer v. Nebraska,
262 U.S. 390 (1923) 16

Middlesex County Sewerage Authority v. National Sea Clammers Association,
453 U.S. 1 (1981) 17

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958) 8

Norris v. Board of Ed. of Greenwood Community Sch. Corp.,
797 F.Supp. 1452 (S.D. Ind. 1992) 16

Norwood v. Slammons,
788 F.Supp. 1020 (W.D. Ark. 1991) 16, 23

Owasso School District v. Falvo,
__ U.S. __, 122 S.Ct. 934 (2002) 22

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 16

Page

Smith v. Robinson,
468 U.S. 992 (1984) 17

State ex rel. The Miami Student v. Miami Univ.,
79 Ohio St.3d 168 (1997) 26

Student Press Law Center v. Alexander,
778 F.Supp. 1227 (D.D.C. 1991) 26

Suter v. Artist M.,
503 U.S. 347 (1992) 21

Tarka v. Cunningham,
917 F.2d 890 (5th Cir. 1990) 16, 22

Tarka v. Franklin,
891 F.2d 102 (5th Cir. 1989) 23

The Florida Star v. B. J. F.,
491 U.S. 524 (1989) 29

United States v. Miami Univ.,
91 F.Supp.2d 1132 (S.D. Ohio 2000) 18, 20, 26

Wisconsin v. Yoder,
406 U.S. 205 (1972) 16

Statutes and Regulations

5 U.S.C. §552(4)(B) 11

5 U.S.C. §552a(g)(1) 11

15 U.S.C. §§1681n-1681p 12

20 U.S.C. §1092(f) 29

20 U.S.C. §1232g 1

Page

20 U.S.C. §1232g(1)(C) 2

20 U.S.C. §1232g(a)(4)(B)(2) 29

20 U.S.C. §1232g(b)(1) 2

20 U.S.C. §1232g(b)(1)(A) 2

20 U.S.C. §1232g(b)(1)(E) 2

20 U.S.C. §1232g(b)(1)(F) 2

20 U.S.C. §1232g(b)(1)(G) 2

20 U.S.C. §1232g(d) 2

20 U.S.C. §1232g(j)(1) 2

20 U.S.C. §1234e 18

P.L. 102-325, 106 Stat. 448 (1992) 26

P.L. 105-244, 105-244 Stat. 1581 (1998) 26

P.L. 107-110, 115 Stat. 1425 (2002) 11

34 C.F.R. §81.3 18

34 C.F.R. §99.64 18

34 C.F.R. §99.67 18

42 U.S.C. §1983 . . . . . *passim*

42 U.S.C. §1988 19

Ala. Code §36-12-40 28

Alaska Stat. §40.25.120(5) 27

Ark. Code Ann. §25-19-195(b)(2) 27

Cal. Educ. Code §49073 *et seq.* 27

Colo. Rev. Stat. §24-72-204(1)(b) 28

Page

Colo. Rev. Stat. §24-72-204(3)(d)(III) 27
D.C. Code Ann. §2-534(a)(6) 28
Del. Code Ann. tit. 29, §10002(d)(6) 28
Fla. Stat. §228.093(3)(d) 27
Idaho Code §9-340A(1) 28
Ind. Code §5-14-3-4(a)(3) 28
Iowa Code §22.7(1) 27
Kan. Stat. Ann. §45-221(a)(1) 28
Ky. Rev. Stat. Ann. §61.878(1)(k) 28
63 Mass. Regs. Code §23.01 *et seq.* 27
Md. Code Ann., State Gov't §10-616(k) 27
Me. Rev. Stat. Ann. tit. 1, §402(3)(A) 28
Mich. Comp. Laws §15.243(2) 27
Minn. Stat. §13.32, Subd. 2(d) 27
Miss. Code Ann. §25-61-11 28
Miss. Code Ann. §37-15-3 28
N.C. Gen. Stat. §7B-3100(a) 28
N.H. Rev. Stat. §91-A:4 28
N.H. Rev. Stat. Ann. §91-A:5 28
N.M. Stat. Ann. §14-2-1(8) 28
N.Y. Pub. Off. Law §87(2)(a) 28
Neb. Rev. Stat. §84-712.05(1) 28
Nev. Rev. Stat. §386.655(1)(a) 28

Page

Ohio Rev. Code Ann. §3319.321 28
OK ST T. 51 §24A.16 28
R.I. Gen. Laws §38-2-2(4)(i)(A) 28
Tenn. Code Ann. §10-7-504(a)(4) 28
Tex. Gov't Code Ann. §552.114(a) 28
Va. Code Ann. §2.2-3705(A)(3) 28
Vt. Stat. Ann. tit. 1 §317(c)(11) 28
Wis. Stat. §118.125(2) 28
Wyo. Stat. Ann. §16-4-203(d)(viii) 28

Legislative History

120 Cong. Rec. 13951 (May 9, 1974) 1, 9, 12
120 Cong. Rec. 13951-52 (May 9, 1974) 12
120 Cong. Rec. 13953 (May 9, 1974) 8, 9
120 Cong. Rec. 13953-54 (May 9, 1974) 9
120 Cong. Rec. 14580 (May 14, 1974) 2, 8, 15
120 Cong. Rec. 14581 (May 14, 1974) 13
120 Cong. Rec. 14584 (May 14, 1974) 13
120 Cong. Rec. 14594 (May 14, 1974) 13
120 Cong. Rec. 36532 (Nov. 19, 1974) 15
120 Cong. Rec. 39862 (Dec. 13, 1974) 9
121 Cong. Rec. 13991 (May 13, 1975) 12, 14

Other Authorities

31 Indiv. with Disabilities Educ. Law Rep. (April 17, 1998) 18

32 Indiv. with Disabilities Educ. Law Rep. (July 21, 1999) 18

34 Indiv. with Disabilities Educ. Law Rep. (Oct. 4, 2000) 15, 18

Restatement (Second) of Torts §652D 19

INTEREST OF *AMICI* [1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to preserving and protecting the principles of liberty embodied in our nation's Constitution and laws. The ACLU of Washington is one of its statewide affiliates. The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g, involves two important statutory rights: access to governmental records and privacy protection against misuse of such records. When Congress enacted FERPA, it relied in part on information gathered by the New York Civil Liberties Union about the dangers of unregulated dissemination of education records. 120 Cong. Rec. 13951 (May 9, 1974)(statement of Sen. Buckley). The ACLU believes that FERPA, in conjunction with other laws like the Freedom of Information Act and the Privacy Act, strikes an appropriate balance between these two important interests, guaranteeing open access to documents that reveal how governmental officials are conducting the public's business, while also ensuring that personal information gathered under compulsion of governmental authority is not distributed at the expense of citizens' privacy. Over the years, ACLU affiliates have counseled many families and school districts regarding their rights and obligations under FERPA. The proper resolution of this case is therefore a matter of significant concern to the ACLU and its members throughout the country.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Unbeknownst to respondent John Doe, petitioner Gonzaga University relied on misinterpretations of hearsay to fill Doe's education records with inaccurate speculations that Doe had engaged in sexual misconduct and then damaged Doe's employment prospects through its longstanding pattern and practice of revealing this damaging (mis)information to third parties without Doe's consent. This is precisely the sort of harm that Congress sought to eliminate by enacting FERPA:

> When parents and students are not allowed to inspect school records and make corrections, numerous erroneous and harmful material [sic] can creep into the records. Such inaccurate materials can have devastatingly negative effects on the academic future and job prospects of an innocent, unaware student.

120 Cong. Rec. 14580 (May 14, 1974)(statement of Sen. Buckley). To prevent injuries like these, FERPA mandates that educational institutions receiving federal funds may not reveal information contained in education records unless consent is given by an adult student, 20 U.S.C. §1232g(d), or a parent of a minor student, 20 U.S.C. §1232g(b)(1), or the disclosure falls within a set of statutory exceptions.[2] The parties presented conflicting testimony at trial as to Doe's alleged misconduct and Gonzaga's methods of investigating it, but the jury -- having had the opportunity to hear all of the testimony and judge the witnesses' credibility -- unanimously concluded that the accusations against Doe were false. There was no evidentiary dispute about Gonzaga's pattern or practice of disclosing information from education records without consent.

[2] Exemptions include, but are not limited to, disclosure within the school to persons with a legitimate educational interest in the information, §1232g(b)(1)(A), disclosure to necessary parties within the state's juvenile justice system, §1232g(b)(1)(E), disclosures necessary for accreditation or research purposes, §§1232g(b)(1)(F) & (G), or disclosures to federal agencies for purposes including educational oversight, §1232g(1)(C), and anti-terrorism investigations, §1232g(j)(1).

Viewing the evidence recounted by the Supreme Court of Washington in *Doe v. Gonzaga University*, 143 Wn.2d 687 (2001), in the light most favorable to the jury's verdict, the facts were as follows: John Doe was enrolled in the education program at Gonzaga University, with the goal of becoming an elementary school teacher. On the day he made his last tuition payment, Doe learned to his surprise that the Dean of Gonzaga's School of Education would not issue the affidavit of good moral character necessary for Doe to obtain a teaching certificate from Washington's Office of the Superintendent of Public Instruction (OSPI). The Dean's low opinion of Doe's morals was based on a collection of speculation and hearsay that Gonzaga recorded in Doe's education records, but never discussed with Doe himself. Gonzaga gathered this information after Defendant Roberta League, Gonzaga's teacher certification specialist, overheard a student telling a friend that she suspected John Doe had sex with his former girlfriend, Jane Doe, in a manner that caused Jane physical pain. League recognized John Doe's name as an education student, and decided that Gonzaga needed to investigate whether he had subjected Jane Doe to date rape or other sexual assault. League and other Gonzaga officials interviewed a number of people who recounted Jane Doe's statements to them about her relationship with Doe. They interviewed Jane Doe once, but she refused to make a statement. Based on these reports of what third parties told the Gonzaga officials that Jane Doe had told them -- but without ever asking John Doe for his version of events -- the Dean decided that she could not certify John Doe's good moral character. Gonzaga did not

limit itself to withholding the certificate; it also informed state agencies about the substance of its investigation.

John Doe sued. Jane Doe testified that John Doe never sexually assaulted her, that she never made many of the statements attributed to her by Gonzaga officials, and that the remaining statements were misinterpreted or blown out of proportion. John Doe and others presented evidence of his good moral character, while other witnesses testified that their statements to Gonzaga officials had been misreported. As reflected by the verdict, the jury believed Doe's version of events. It awarded him over $700,000 in damages on his state law claims for defamation, breach of contract, negligence, and invasion of privacy, and awarded him $150,000 in damages plus $300,000 in punitive damages for Gonzaga's unauthorized disclosure of information from his education records pursuant to a policy or practice in violation of FERPA.

The evidence of the FERPA violation was uncontradicted. Although teacher certification requires an affidavit from the dean regarding the teacher candidate's fitness, Gonzaga went far beyond simply providing or not providing the affidavit as required by state law. Gonzaga personnel routinely called employees at OSPI to reveal information about students for whom they had developed "cause for concern." 143 Wn.2d at 707. During these calls, Gonzaga routinely disclosed information contained in students' education records without consent and regardless of whether it fell within a statutory exemption. Doe's case typified this pattern: Gonzaga began disclosing information about Doe to OSPI before he ever applied for a teaching certificate. There were "numerous" telephone disclosures identifying Doe by name and describing the progress of the investigation. 143 Wn.2d at 695. The first of these calls occurred after Gonzaga had interviewed only one witness, thus increasing the likelihood that incomplete or misleading information would be transmitted. Gonzaga did not argue that these disclosures to OSPI fell within a statutory exemption from the consent requirement, and no evidence was offered to suggest that any exemption applied.

The Supreme Court of Washington affirmed the judgment in most respects. On the federal claim, it agreed with the overwhelming majority of courts in finding that Doe could use 42 U.S.C. §1983 to vindicate student privacy rights under FERPA. It also found sufficient evidence to support the jury's finding that Gonzaga had violated the statute and merited punitive damages. This Court granted *certiorari* to determine whether FERPA could be enforced through §1983, but declined to review Gonzaga's argument that it did not act under color of state law.

SUMMARY OF ARGUMENT

Amici agree with the overwhelming majority of courts that have examined the text, structure, and history of FERPA to conclude that it may be judicially enforced through 42 U.S.C. §1983. The line of cases running from *Maine v. Thiboutot*, 448 U.S. 1 (1980), through *Blessing v. Freestone*, 520 U.S. 329 (1997), establishes the test for determining whether a statute creates a "federal right" under §1983. FERPA undoubtedly satisfies this test. The statute is clearly intended to benefit students and their families by giving them individually exercisable veto power over disclosure of education records maintained by federally funded educational institutions. The right of confidentiality is expressed in concrete terms that are not so vague and amorphous as to strain judicial competence. The obligation to maintain confidentiality is mandatory, not optional. And nothing in the statute specifically forecloses a §1983 remedy or otherwise rebuts the presumption of private enforcement. Rather than repeat the detailed analysis of the *Blessing* test

in Doe's brief, this *amicus* brief explains why the privacy of education records is so important, why a private cause of action is fully consistent with Congress's goals in enacting FERPA, and why the petitioners' dire warnings about adverse consequences of the majority rule are unfounded.

Education records contain a vast storehouse of intimate information about students, which includes not only their grades, but also observations about their personalities, their medical and psychiatric histories, and their family circumstances. Because attendance by students is compulsory, schools acting *in loco parentis* are in a position to have more information about students than anyone other than parents themselves. In enacting FERPA, Congress was outraged by incidents where intimate family information was misused to the detriment of students' future education and job prospects. Congress considered such conduct to be wrongful, and it intended for FERPA to eradicate these practices. Congress viewed individual control over personally identifiable information in education records as a civil right, crucial to individual and family autonomy against the power of state institutions.

The civil rights created by FERPA cannot be fully protected without a private cause of action. Agency enforcement is beneficial on a systemic level, but it cannot provide two things that affected families need most: immediate injunctive relief (to gain access to wrongfully withheld records or to prevent imminent threats of unauthorized disclosures) and compensation for past violations. Private actions for declaratory, injunctive, or compensatory relief form a natural complement to agency enforcement. Unlike denial of federal funding, which is a harsh and inflexible remedy that would be crippling to an educational institution, private damages actions are more closely tailored to specific violations and give additional credibility to the Department of Education's (DOE) enforcement activities. The prospect of

inconsistent interpretations of FERPA by courts hearing §1983 actions is historically unfounded.

The dire consequences predicted by petitioners are not a valid basis for altering this Court's customary test for assessing statutes creating federal rights. There will be no flood of FERPA litigation if this Court upholds the majority rule. Decades of experience with the statute have resulted in very little FERPA litigation. What litigation there has been has resulted mainly in declaratory and injunctive relief only. Furthermore, the structure of the statute precludes claims over single instances of wrongful disclosure. FERPA actually rescues educational institutions from the tug of war between families seeking privacy and media outlets seeking disclosure. There is no reason to fear that §1983 enforcement of FERPA will somehow turn sunshine laws into confidentiality statutes.

ARGUMENT

I. Congress Correctly Recognized The Strong Individual Interest Of Students And Their Families In Protecting The Privacy Of Education Records

A. Educational Institutions Compel Families to Disclose Intimate Personal Information That Could Cause Serious Harm If Misused

Through compulsory education laws, the states require that children spend a large portion of their waking hours in educational institutions under the close watch of school officials. Next to the family itself, school staff are in the best position to gather personal information about students and record it in permanent or semi-permanent records that accompany students through the educational process. Education records contain more than just grades and records of attendance. They can contain teachers' observations about

students' personalities and learning styles; assessments of their social relationships with other students; health and medication history; information about the student's family; instances of school discipline, whether for minor infractions like talking in class to major infractions like fighting or possession of contraband; counseling records; sexual history information; or anything else that a school chooses to record.

The volume and the intimacy of the information maintained by schools makes it critically important that families have control over how a school records and disseminates the personal information of individual students. Congress adopted FERPA because it disapproved of invasions of privacy perpetrated by school officials, such as:

- A secretary for a community tutoring project called a school to confirm which grade a student was enrolled in. During the call, the principal gratuitously read from education records indicating that the student was a bed-wetter and his mother was an alcoholic with different boyfriends visiting the house each night. 120 Cong. Rec. 13953 (May 9, 1974).

- A student was forbidden from attending her own junior high graduation because the school considered her a "bad citizen." The school refused to divulge the alleged evidence of "poor citizenship" to the parents. 120 Cong. Rec. 14580 (May 14, 1974).

- Some families learned that schools kept records of political involvement that could be constitutionally protected against mandatory disclosure under *Bates v City of Little Rock*, 361 U.S. 516, 524 (1960), and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958). An African-American father discovered that his daughter's education records contained five pages of detailed notes about his "political activity." A student who criticized his school's administration found the notation "radical tendencies" placed in his school record. 120 Cong. Rec. 13953-54 (May 9, 1974).

Concerned that "trivial or erroneous material kept in such files can harm and haunt individuals throughout their lives" when it is disclosed to others, 120 Cong. Rec. 13951 (May 9, 1974), Congress enacted FERPA "to assure parents of students, and students themselves if they are over the age of 18 or attending an institution of postsecondary education, access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent." 120 Cong. Rec. 39862 (Dec. 13, 1974)("Joint Statement in Explanation of the Buckley/Pell Amendment"). Recent FERPA cases demonstrate how the potential for individual harm from lack of access to, or unauthorized disclosure of, education records persists to this day.

- A public university in New Jersey routinely distributed class rosters containing students' social security numbers. *Krebs v. Rutgers*, 797 F.Supp. 1246 (D.N.J. 1992).

- An attorney for a New Hampshire school district obtained copies of a student's juvenile court records for use in evaluating his individual education plan. Although the student's mother needed these records to advocate effectively for her son's educational needs, the district refused to release

them to her. *Belanger v. Nashua, New Hampshire, School District*, 856 F.Supp. 40 (D.N.H. 1994).

- A Kentucky school released information to a newspaper reporter that allowed the paper to describe "a 12-year-old female with severe emotional and behavioral problems, resulting primarily from a medical condition, hermaphroditism." *Doe v. Knox County Board of Education*, 918 F.Supp. 181, 183 (E.D. Ky. 1996)(remanding for trial to determine if the unauthorized disclosure involved personally identifiable information).

- After a South Dakota school district endured significant expenses in accommodating the needs of a special education student, it released information identifying the student's family. The student was identified by name and by photograph in the local media, which led to harassing phone calls and attempts to force the family to move. *Maynard v. Greater Hoyt School District No. 61.4*, 876 F.Supp. 1104 (D.S.D. 1995).

- An Ohio school district sold personal information about its students to a bank for use in a direct-mail marketing campaign to recruit customers for "Small Savers Prestige Accounts." As part of the transaction, the school released names, ages, grade levels, home addresses, and, in some instances, social security numbers of their students. *Connors v. Board of Education of the Indian Creek Local Sch. Dist.*, No. C-2-00-0990 (S.D. Ohio 2000).

The hazards of unauthorized disclosure of education records will, if anything, grow more serious as a result of recent developments causing ever more personal information being demanded and included in education records. In response to concerns over school violence, for example, some schools require perceived "problem students" to undergo psychiatric evaluations, the results of which become part of the students' files. *LaVine v. Blaine School District*, 257 F.3d 981 (9th Cir. 2000), *reh'g denied*, 2002 WL 109285 (Jan. 29, 2002); *Boman v. Bluestem Unified Sch. Dist.*, 2000 WL 297167 (D. Kan. Jan. 28, 2000). Schools conducting drug testing of students may keep records of test results. *Earls v. Tecumsah Public Sch. Dist.*, 242 F.3d 1264, 1268 (10th Cir. 2001), *cert. granted*, __ U.S. __, 122 S.Ct. 509 (2001). The No Child Left Behind Act of 2001, P.L. 107-110, 115 Stat. 1425 (2002), mandates increased reliance on standardized testing and other outcome-based assessments of education that must be recorded. And the increasing use of public/private partnerships as a method of education funding increases the pressure for schools to gather and release information for marketing purposes.

B. Congress Viewed Educational Privacy As An Individual Civil Right

The legislative history of FERPA provides ample evidence that Congress was concerned with the impact of the improper release of education records on individual students and their families. Senator Buckley, the Act's chief sponsor, likened FERPA to other judicially enforceable statutes such as the federal Privacy Act, 5 U.S.C. §552a(g)(1), the Freedom of Information Act, 5 U.S.C. §552(4)(B), and the

Fair Credit Reporting Act, 15 U.S.C. §§1681n-1681p. *See* 120 Cong. Rec. 13951-52 (May 9, 1974), 121 Cong. Rec. 13991 (May 13, 1975). These acts create an individual entitlement to some measure of personal control over information held by others. Congress enacted FERPA in precisely the same spirit.

> The public has also become aware of the *genuine danger to the privacy and civil liberties of all Americans* posed by the growth of such secret files and computer banks. Several bills have been introduced in Congress to attempt to deal with this problem, and I am pleased to be a cosponsor of one of the most significant ones, S. 2883, the Fair Credit Reporting Act of 1974.
>
> [I]n spite of this evidence of increased awareness and concern over these dangers, hardly any public outcry has been heard about the *systematic violation of privacy and personal rights*, through the existence of secret files, of two of the largest classes of Americans.
>
> I speak of the *right of privacy of millions of children* in the schools across our nation whose school records are routinely made available to governmental and other busybodies, *and the rights of their parents*, who are too often denied access to such information.

120 Cong. Rec. 13951 (May 9, 1974)(statement of Sen. Buckley)(emphasis added). On several occasions, Senator Buckley explained that FERPA was intended to be a civil rights law.

> Let me note that programs of Federal aid to the States and localities have almost always required that the recipients meet certain conditions -- the area of civil rights and nondiscrimination being one of the most prominent examples -- in order to be eligible for assistance. *My amendment serves to make the protection of civil rights more comprehensive.*

120 Cong. Rec. 13952 (May 9, 1974)(emphasis added). *See also id.* (law should act as a "personal shield for every American"); *id.* at 14581 (May 14, 1974)("My amendment broadens the protection of civil rights to include the civil rights of parents and students vis-à-vis the schools" and is concerned with "the personal rights of America's children and their parents").

Senator Buckley's understanding was shared by other supporters of the bill. Senator Cranston offered to "wholeheartedly support" the privacy protections of FERPA, noting that they "preserve a *right to confidentiality* of records of student academic and personal performance that should be guaranteed." 120 Cong. Rec. 14594 (May 14, 1974)(emphasis added). Senator Ervin noted that privacy of public school pupils "is a problem that has long been with us. The time has come to do something about it." 120 Cong. Rec. 14584 (May 14, 1974). Senator Biden also thought educational privacy protections were "long overdue." *Id.* The latter statements reveal an important truth about the statute: Congress would not have enacted FERPA if it believed existing state law tort remedies were adequate to ensure educational privacy. Senator Buckley likened existing remedies to thin "veils" that were insufficient to protect the rights of students and parents.

More fundamentally, my initiation of this legislation rests on my belief that the protection of individual privacy is essential to the continued existence of a free society. *There has been clear evidence of frequent, even systematic violations of the privacy of students and parents* by the schools through the unauthorized collection of sensitive personal information and the unauthorized, inappropriate release of personal data to various individuals and organizations. In addition, the growth of the use of computer data banks on students and individuals in general has threatened to tear away most of *the remaining veils guarding personal privacy*, and to place enormous, dangerous power in the hands of the government, as well as private organizations.

121 Cong. Rec. 13991 (May 13, 1975)(emphasis added). Because Congress specifically designed FERPA to eradicate existing institutional practices it considered wrongful, tort liability for wrongdoers under §1983 is entirely consistent with Congress's intent.

Indeed, Congress believed that opportunities for judicial interpretation of FERPA were both inevitable and beneficial.

> All this is not to suggest that there are no problems and uncertainties involved in the implementation of the Buckley amendment. But it must be realized that such problems and questions arise before, during, and after the implementation of nearly every law. *That is one of the reasons we have courts*, where considerations of the intent of legislation, the test of reasonableness and of equity usually

> combine to produce proper and appropriate applications of the law.

120 Cong. Rec. 36532 (Nov. 19, 1974)(emphasis added).

Congress recognized that invasion of privacy through education records was for the most part a problem created by the government. Almost all of the schools in the nation receiving federal funds are public schools. 34 Indiv. with Disabilities Educ. Law Rep. 151 (Oct. 4, 2000)(DOE Letter to Representative Bob Schaffer). The proportion is even higher in the primary schools. *Id.* Senator Buckley noted that control over education records is intertwined with control over child-rearing itself, an area of intimate personal decision-making that should rest with individual parents, not the state.

> The sense of a loss of control over one's life and destiny . . . seems to be increasingly felt by parents with respect to the upbringing of their own children. Such elitist and paternalistic attitudes [of educators] reflect the widening efforts of some, both in and out of Government, *to diminish the rights and responsibilities of parents for the upbringing of their children, and to transfer such rights and functions to the State* -- to separate, figuratively, and in some cases, literally, the child from his parents, and to turn him over to the care of the State, as represented by schools and other arms of its administration.

120 Cong. Rec. 14580 (May 14, 1974)(emphasis added). In this way, FERPA reflects an abiding constitutional value: that child-rearing decisions are to be made first and foremost within the family, even where society has a strong in-

terest in requiring a minimum level of formal education. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). *See also* Brief of *Amicus* Capitol Resource Institute in *Owasso Sch. Dist. v. Falvo*, 2001 WL 1222398 (2001). Because educational privacy is a problem chiefly created by government, and because the violation of educational privacy can and often does involve important constitutional rights, it was appropriate for Congress to construct an education privacy statute that could be enforced through §1983. The overwhelming majority of courts considering the question have held that FERPA can be so enforced.[3]

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[3] *See Falvo v. Owasso Ind. Sch. Dist. No. I-011*, 233 F.3d 1203 (10th Cir. 2000), *rev'd on other grounds*, __ U.S. __, 122 S.Ct. 934 (2002), *Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144*, 45 F.Supp. 2d 664 (D. Minn. 1999); *Brown v. City of Oneonta*, 106 F.3d 1125 (2d Cir. 1997), *cert. denied*, __ U.S. __, 122 S.Ct. 44 (2000); *Cullens v. Bemis*, 979 F.2d 850 (table),1992 WL 337688 (6th Cir. Nov. 18, 1992); *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990); *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21 (2d Cir. 1986); *Goodreau v. Rector and Visitors of the Univ. of Virginia*, 116 F.Supp.2d 694 (W.D. Va. 2000); *Doe v. Knox County Bd. of Educ.*, 918 F.Supp. 181 (E.D. Ky. 1996); *Lewin v. Med. Coll. of Hampton Roads*, 931 F.Supp. 443 (E.D. Va. 1996), *aff'd*, 131 F.3d 135 (4th Cir. 1997); *Maynard v. Greater Hoyt Sch. Dist. No. 61-4*, 876 F.Supp. 1104 (D.S.D. 1995); *Belanger v. Nashua, N.H., Sch. Dist.*, 856 F.Supp. 40 (D.N.H. 1994); *Krebs v. Rutgers University*, 797 F.Supp. 1246 (D.N.J. 1992); *Francois v. University of the Dist. of Columbia*, 788 F.Supp. 31 (D.D.C. 1992); *Norwood v. Slammons*, 788 F.Supp. 1020 (W.D. Ark. 1991). Only two federal district courts have declined to recognize a §1983 cause of action to enforce FERPA. *Gundlach v. Reinstein*, 924 F.Supp. 684 (E.D. Penn. 1996), *aff'd without opinion*, 114 F.3d 1172 (3d Cir. 1997)(table); *Norris v. Board of Ed. of Greenwood Community Sch. Corp.*, 797 F.Supp. 1452 (S.D. Ind. 1992).

C. The Individual Privacy Rights That Congress Codified in FERPA Cannot Be Fully Protected Without A Private Cause of Action

1. Agency Enforcement Cannot Provide Immediate Injunctive Relief or Compensation for Past Injuries

The Department of Education's Family Privacy Compliance Office (FPCO) performs a valuable function in monitoring and encouraging compliance with FERPA. Its general *enforcement* powers, however, do not include *remedial* relief to individuals whose rights are violated by a federally funded educational institution. This Court has "stressed that a plaintiff's ability to invoke §1983 cannot be defeated simply by '[t]he availability of administrative mechanisms to protect the plaintiff's interests.'" *Blessing*, 520 U.S. at 347 (citation omitted). The lack of agency tools for individual relief under FERPA contrasts sharply with the detailed remedial schemes found in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 20 (1981)(statute had separate provisions for citizen suits), and *Smith v. Robinson*, 468 U.S. 992 (1984)(statute expressly provided for judicial review of agency adjudications).

Most FERPA litigation has sought injunctive and declaratory relief only. Families facing ongoing or imminent violations -- like the New Hampshire mother who needed immediate access to her son's records in *Belanger*, or the New Jersey students whose social security numbers were to be distributed in *Krebs* -- cannot secure any relief through the administrative process with the timeliness or effect of an injunction. The process is simply too prolonged to respond effectively to a dynamic situation. Under FPCO's regulations, a written complaint initiates an investigation, which, if

substantiated, is followed by a notice of violation, after which the offending institution is afforded "a reasonable period of time" to comply voluntarily with its FERPA obligations. *See* 34 C.F.R. §99.64. Only if FPCO cannot obtain voluntary compliance will it initiate any formal proceedings to compel compliance. *See* 34 C.F.R. §§81.3, 99.67. Even an agency cease and desist order (if one is issued) cannot be enforced through the contempt power as an injunction would. Cease and desist orders under FERPA are not self-executing, and can be enforced only by cutting off federal funds or by referring the matter to the Attorney General, both of which would require additional procedures after the initial entry of the agency's order. 20 U.S.C. §1234e. *See United States v. Miami Univ.*, 91 F.Supp.2d 1132, 1159 (S.D. Ohio 2000)("Absent additional enforcement measures, a cease and desist order under §1234e merely serves as notice to the fund recipient that the Department considers the recipient's actions to be in violation of FERPA"). By the time all of these administrative hurdles have been cleared, it is likely that damage sought to be avoided will have already occurred. This unfortunate result is even more likely because FPCO is a small agency -- in 2000 it consisted of seven staff members -- that has experienced frequent backlogs in responding to complaints. *See* 34 Indiv. with Disabilities Educ. Law Rep. 151 (Oct. 4, 2000)(DOE Letter to Representative Bob Schaffer); South Glens Falls (N.Y.) Cent. Sch. Dist., 32 Indiv. with Disabilities Educ. Law Rep. 100 (July 21, 1999)(FPCO letter apologizing for delayed response to parent's complaint and attributing the backlog to the "large amount of incoming correspondence [the] Office receives."); Fonda-Fultonville (N.Y.) Cent. Sch. Dist., 31 Indiv. with Disabilities Educ. Law Rep. 149 (April 17, 1998)(same).

Even if FPCO enforcement were an adequate substitute for injunctive relief, it could never provide compensation for

past injuries caused by unlawful policies or practices. The only possible result of the administrative procedure is an agreement by an educational institution to change those policies or practices in the future to avoid new harms. This form of enforcement does not "necessarily respond to the harm suffered by aggrieved individuals." *Krebs*, 797 F.Supp. at 1258. The *Gonzaga* case is atypical of FERPA damages actions in many ways. First, it is the only FERPA case ever to award substantial damages. Second, Gonzaga's FERPA violation was accompanied by actionable defamation, because the information disseminated from Doe's education records was determined to be false. Most FERPA plaintiffs will face dissemination of truthful information, like the New Jersey students in *Krebs* whose social security numbers were shown to other students, or the Ohio families in *Connors* whose personal information was sold to a private business for marketing purposes. These plaintiffs will have a harder time meeting the high burdens of common law invasion of privacy through publication of private facts. Restatement (Second) of Torts §652D (disclosure must be "highly" offensive to a reasonable person and not of legitimate concern to the public). If damage suits are filed at all under state law theories for cases like these, the damages would likely be too small to attract qualified counsel on a contingent fee basis.[4]

2. Withholding Of Federal Funds Is A Far Harsher Remedy Than Tort Liability And Is Not A Realistic Deterrent

Termination of federal funding is an inflexible and harsh remedy. As a result, "the Secretary cannot be expected to threaten and/or act upon this drastic remedy for

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[4] Enforcement of FERPA through §1983 allows the prevailing parties to receive attorneys' fees under 42 U.S.C. §1988.

each and every minor FERPA violation." *Krebs*, 797 F.Supp. at 1257. Even in instances where DOE has found that a FERPA violation occurred, it has not taken steps to deny the offending institution federal funds. *See Maynard*, 876 F.Supp. at 1107. The reluctance to deny funding is perfectly understandable, since loss of funds could "exacerbate [a] community's financial burden in providing the 'free, appropriate, public education' required by other federal statutes." *Id.*

> Such a harsh remedy would serve as a significant financial blow to universities and other institutions, and potentially could cause a decrease in the level of education. In the long-run, the students attending these institutions and their parents -- the parties whom FERPA was intended to protect -- would be the ones most penalized by such action. Therefore, except in the most egregious cases, termination of federal funding would actually stymie the purposes of FERPA, rather than advance them.

Miami Univ., 91 F.Supp.2d at 1140. As a result, DOE has not once in the nearly thirty years since Congress enacted FERPA withheld or terminated funding for a violation of FERPA.

The present case, although it represents the only significant damages award under FERPA, demonstrates how §1983 liability is less severe to an institution than termination of federal funds. In the case at hand, the jury made a very rare damage award of $150,000 in damages for the FERPA violation, and a still rarer award of $300,000 in punitive damages. If DOE had exercised its authority to withdraw Gonzaga's federal funding, the school stood to lose between $23

and $30 million in annual federal assistance. Respondent's Brief in Opposition to Petition for Writ of *Certiorari* at 11 n.4.

The availability of a private judicial remedy is likely to make FPCO's job easier. Under agency enforcement regulations, it is very difficult for the agency persuasively to speak softly and carry a big stick: the stick is so big that all involved in the negotiations know it will not be wielded. Private enforcement allows FPCO to point to the less expensive, but more realistic possibility of a §1983 action from injured parties if the educational institution does not change its offending policies and practices. In addition to being a more credible deterrent, the possibility of private enforcement lets FPCO enter negotiations with the *persona* of a friendly partner in education seeking to help the funding recipient avoid trouble from others, rather than as a bully relying on the threat of an excessive and disproportionate penalty.

3. Conflicting Court Interpretations Of FERPA Are Unlikely

Unlike the vague terms of the statute in *Suter v. Artist M.*, 503 U.S. 347 (1992), that called for funding recipients to undertake "reasonable efforts" towards "substantial compliance," FERPA is a concrete and eminently intelligible statute. Students and families must be allowed to see their education records except for certain statutorily defined exceptions, and schools must keep education records confidential unless the family consents or the disclosure falls within a statutorily defined exception. Whatever room remains for disagreement on details may be resolved through deference to reasonable agency regulations under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Nothing in FERPA is so "vague and amorphous" that enforcement

would strain judicial competence. *Blessing*, 520 U.S. at 340.

There is little basis to Gonzaga's assertion that "FERPA has given rise to an extraordinary volume and startling variety of interpretations by students and parents" and that FERPA can arise every day "in a bewildering array of unanticipated circumstances." Petitioners' Brief at 26-27. To the contrary, the relatively small amount of FERPA litigation shows that courts are quite capable of correctly interpreting and applying the Act. The only issue to be the subject of any serious difference of judicial opinion has been the definition of "education records," and that was recently resolved in *Owasso School District v. Falvo*, __U.S. __, 122 S.Ct. 934 (2002), through the ordinary and nondramatic application of this Court's final authority over legislative interpretation. For every other issue that has arisen under the statute, the federal courts have been in near-total harmony. They have uniformly found that one-time violations of the confidentiality subsection do not constitute a "policy or practice" of unauthorized disclosures.[5] They have uniformly rejected attempts to use FERPA as a lever to change the substance of a school's educational programs.[6] They have agreed that a plaintiff must be a student or parent to fall within the class of persons for whose benefit FERPA was created.[7] Finally, the federal courts have uniformly agreed

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[5] *See, e.g., Achman*, 45 F.Supp. 2d 664; *Gundlach*, 924 F.Supp. 684; *Maynard*, 876 F.Supp. 1104; *Francois*, 788 F.Supp. 31.

[6] *Owasso School District v. Falvo*, __ U.S. __, 122 S.Ct. 934 (2002) (rejecting use of FERPA to challenge practice of students grading each others' papers); *Lewin*, 931 F.Supp. 443 (rejecting use of FERPA to challenge grades); *Tarka v. Cunningham*, 917 F.2d 890 (same).

[7] *Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576 (5th Cir. 1987)(FERPA does not prevent release of teacher's personnel file); (continued...)

that FERPA does not contain an implied right of action under *Cort v. Ash*, 422 U.S. 66 (1975),[8] and with almost no exceptions they have also held that FERPA does create federal rights enforceable through §1983.[9]

D. Affirming the Majority Rule Will Not Result In the Dangers Asserted By Gonzaga and its *Amici*

1. There Has Not Been, And There Will Not Be, A Flood Of FERPA Damages Litigation Against School Districts Under §1983

Gonzaga and its *amici* forecast a torrent of damages litigation against educational institutions receiving federal funds. As explained below, the fear is simply not justified as a factual matter. Even if it were, the prospects of future litigation is no reason to disregard Congress's expressed intent. Just this Term in *Swierkiewicz v. Sorema, N.A.*, __ U.S. __, __, 122 S.Ct. 992, 999 (2002), this Court unanimously rejected the argument that the unsubstantiated risk of frivolous future lawsuits could justify an unwritten exception to the governing statute or rule.

Fortunately, the Court does not need to speculate about the effect of allowing plaintiffs to enforce FERPA through §1983. The vast majority of lower courts addressing the issue have authorized FERPA suits since the mid-1980's,

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[7] (...continued)
Norwood, 788 F.Supp. 1020 (prospective university student could not access education records pertaining to current students).

[8] *See, e.g., Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52 (1st Cir. 2002); *Tarka v. Franklin*, 891 F.2d 102 (5th Cir. 1989); *Fay*, 802 F.2d 21; *Girardier v. Webster Coll.*, 563 F.2d 1267 (8th Cir. 1977).

[9] *See* footnote 3 above.

generating a history that reveals several important patterns. First, there simply is not very much FERPA litigation. Considering that federal funds reach tens of thousands of school districts educating millions of students every year, the paucity of litigation is striking. Although it was enacted in 1974, there are only a few dozen reported cases involving individual claims under the statute, and this Court never had reason to examine FERPA until this Term. Second, only a portion of the FERPA litigation that has been brought under §1983 has sought damages, with most of it seeking only injunctive relief. Third, cases seeking damages have been overwhelmingly unsuccessful, either because the plaintiff fails on the merits or because the defendants have qualified immunity. Fourth, the damages that have been awarded are modest. To *amici*'s knowledge, the present case is the only FERPA case to ever result in an award of punitive damages. In the only other reported cases where damages were a possibility on remand, the courts indicated that damages, if any, were likely to be small or perhaps even nominal. *Fay*, 802 F.2d at 34, *Goodreau*, 116 F.Supp.2d at 708. Attorneys fees are also likely to be modest, since FERPA cases can frequently be resolved on summary judgment (the fact of disclosure without consent will typically be undisputed, and the applicability of statutory exemptions will be a question of law). *See, e.g.*, *Achman*, 45 F.Supp.2d at 674; *Lewin*, 931 F.Supp. at 443; *Maynard*, 876 F.Supp. at 1107-08; *Belanger*, 856 F.Supp. at 52. An atypical case like *Doe v. Gonzaga* cannot be the basis for judging the likely effects of continuing the majority rule.

There are a number of features within FERPA that ensure that litigation will rarely arise, and only then in situations involving serious violations of family privacy. To begin with, FERPA is easy to understand: it says to keep education records confidential unless the disclosure is permitted by a specific exemption. Most school districts have no difficulty understanding the obligation of confidentiality and obeying the congressional mandate. Interpretive guidance is also available from DOE. 34 C.F.R. Part 99. Another important check to FERPA litigation is the requirement that the educational institution have a "policy or practice" of unauthorized disclosure. FERPA's "policy or practice" language has prevented liability over single instances of wrongful disclosure, and it is likely to preclude *respondeat superior* liability in the absence of an institutional policy as well. Finally, FERPA has been around for decades. School administrators have had ample time to ensure that their record-keeping policies are in harmony with its confidentiality requirements. An educational institution persisting in policies of unauthorized disclosure that Congress sought to eliminate back in 1974 should not be viewed as a hapless victim of a newly imposed federal mandate. The defendants in any future FERPA litigation are likely to be those who simply flouted the law without any good faith claim to have been relying on a statutory exemption, as the jury concluded Gonzaga did in this case.

2. FERPA Frees Educational Institutions From Competing Demands Over Education Records

Amici American Association of Community Colleges, *et al.* (AACC), argue that judicial enforcement of FERPA will place educational institutions in a tug of war between media outlets seeking release of information and families seeking to keep it confidential. AACC Brief at 12-14. The concern is misplaced. By establishing a clear baseline rule of confidentiality and a set of narrow enumerated exemptions, FERPA actually frees educational institutions from the tug of war. The institution simply informs the media outlet seeking access to protected education records that federal law prohibits their disclosure. The absence of a robustly en-

forced FERPA would put educational institutions in a far more awkward situation than they currently face.

The two instances cited where universities were involved in litigation over disclosure of records did not involve enforcement of FERPA through §1983 in any event, so reversing the majority rule would be no guarantee against future disputes. The plaintiffs in *Student Press Law Center v. Alexander*, 778 F.Supp. 1227 (D.D.C. 1991), argued unsuccessfully in a §1983 action that FERPA's confidentiality provisions violated their constitutional rights. Congress later amended FERPA to give access to much of the campus crime information sought in that action. P.L. 102-325, 106 Stat. 448 (1992) §1555, and P.L. 105-244, 105-244 Stat. 1581 (1998) §951. The Miami University case arose under the Ohio Public Records Act, not §1983. *State ex rel. The Miami Student v. Miami Univ.*, 79 Ohio St.3d 168 (1997). It resulted in a second round of non-§1983 enforcement litigation by DOE only because the state court erred in its initial interpretation of FERPA (it had given an untenable construction to the statutory definition of "education record" and failed to afford *Chevron* deference to DOE's interpretations). *Miami Univ.*, 91 F.Supp.2d at 1149, 1152. While unpleasant for the universities involved, the successive rounds of litigation were an unavoidable byproduct of our nation's federal structure, combined with a single instance of judicial error that was later corrected. Neither situation provides a basis to eliminate individual redress for persons injured by FERPA violations.

3. The Concerns Of *Amici* Regarding Media Access To Student Records Are Misplaced

Amici Reporters Committee, *et al.*, worry that enforcing FERPA through §1983 will cause state agencies to withhold otherwise available government records out of fear that disclosure will lead to civil liability. As a strong proponent of public access to government records, the ACLU would likely join the Reporters Committee in a case presenting a serious danger of limiting access to records demonstrating how the government conducts public business. This is not such a case.

In essence, the Reporters Committee argument is directed against FERPA itself, rather than against judicial enforcement of it. A §1983 action under FERPA will only lie where a state agency has a policy or practice of releasing information that federal law deems confidential. It would neither expand nor contract the scope of information subject to mandatory disclosure or confidentiality. Actions under §1983 could not be used as a "reverse FOIA" through which sunshine laws would be converted into secrecy laws, because confidentiality may only be judicially enforced where the underlying statute actually mandates confidentiality. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 285 (1979)("FOIA is purely a disclosure statute and affords . . . no private right of action to enjoin agency disclosure").

The Reporters Committee acknowledges that the privacy of personal information held by government agencies is an appropriate subject for legislation. Reporters Committee Brief at 23-25. In practice, there are no serious conflicts between state public disclosure laws and FERPA, because many state laws already contain express protection for education records[10] or for information that must be kept confi-

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[10] *See, e.g.*: Alaska: Alaska Stat. §40.25.120(5); Arkansas: Ark. Code Ann. §25-19-195(b)(2); California: Cal. Educ. Code §49073 *et seq.*; Colorado: Colo. Rev. Stat. §24-72-204(3)(d)(III); Florida: Fla. Stat. §228.093(3)(d); Illinois: 5 Ill. Comp. Stat. 140/7(1)(a); Iowa: Iowa Code §22.7(1); Maryland: Md. Code Ann., State Gov't §10-616(k); Massachusetts: 63 Mass. Regs. Code §23.01 *et seq.*; Michigan: Mich. Comp. Laws §15.243(2); Minnesota: Minn. Stat. §13.32, Subd. 2(d); (continued...)

dential by operation of federal law.[11] The various amendments over the years to FERPA's list of statutory exemptions show that Congress has the same ability as state legislatures to revisit the scope of the statute as circumstances demand.[12] Indeed, Congress has agreed with the media that much college and university crime information should be available. FERPA's definition of confidential "education records" excludes "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement." 20 U.S.C. §1232g(a)(4)(B)(2). In addition, the Student Right to Know Act requires all colleges and universities participating in federal student assistance programs to

[10] (...continued)
ST T. 51 §24A.16; Rhode Island: R.I. Gen. Laws §38-2-2(4)(i)(A); Tennessee: Tenn. Code Ann. §10-7-504(a)(4); Texas: Tex. Gov't Code Ann. §552.114(a); Vermont: Vt. Stat. Ann. tit. 1 §317(c)(11); Virginia: Va. Code Ann. §2.2-3705(A)(3); Washington: Wash. Rev. Code 42.17.310(1)(a); Wisconsin: Wis. Stat. §118.125(2); Wyoming: Wyo. Stat. Ann. §16-4-203(d)(viii).

[11] *See, e.g.*: Alabama: Ala. Code §36-12-40; Colorado: Colo. Rev. Stat. §24-72-204(1)(b); Delaware: Del. Code Ann. tit. 29, §10002(d)(6); District of Columbia: D.C. Code Ann. §2-534(a)(6); Idaho: Idaho Code §9-340A(1); Indiana: Ind. Code §5-14-3-4(a)(3); Kansas: Kan. Stat. Ann. §45-221(a)(1); Kentucky: Ky. Rev. Stat. Ann. §61.878(1)(k); Maine: Me. Rev. Stat. Ann. tit. 1, §402(3)(A); Mississippi: Miss. Code Ann. §25-61-11; New Hampshire: N.H. Rev. Stat. §91-A:4; New Mexico: N.M. Stat. Ann. §14-2-1(8); New York: N.Y. Pub. Off. Law §87(2)(a).

[12] Although Congress has frequently amended FERPA since its initial passage, it has never questioned the clear judicial consensus that FERPA can be enforced through §1983. *Cf. Edelman v. Lynchburg College*, No. 00-1072 (March 19, 2002), slip op. at 9 (Congress is presumed to have consented to agency regulation that it has not repudiated).

gather and disseminate campus crime statistics. 20 U.S.C. §1092(f).

In its quest to overturn Congress's legislative choice, the Reporters Committee suggests a novel gloss on §1983: namely, that the statute allows judicial enforcement only of those federal rights "secured by the Constitution and laws *other than laws involving privacy*." Reporters Committee Brief at 4 (emphasis added). Of course, no such limitation appears in the text of §1983, its history, or the cases interpreting it. The argument that §1983 should extend only to federal rights arising under traditional civil rights laws was rejected in *Maine v. Thiboutot*, 448 U.S. 1, and never embraced since. A privacy law that abridges First Amendment rights can of course be challenged constitutionally, either on its face or as applied. *E.g.*, *The Florida Star v. B. J. F.*, 491 U.S. 524 (1989). But, where Congress has enacted a constitutionally valid statute, there is no principled reason to treat statutory privacy rights as less deserving of judicial enforcement than other statutory rights.

CONCLUSION

For the reasons stated above, the judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted,

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Dated: March 25, 2002